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IN THE

Supreme Court of the United States

OCTOBER TERM 1984

DAIRYMEN, INC.

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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108 pp

QUESTIONS PRESENTED

1. Whether a decision that Section 3 of the Clayton Act (15 U.S.C. § 14) was violated solely by reason of the quantitative size of a temporary market foreclosure found to have been occasioned by an agricultural dairy cooperative's supply contracts, which were limited to only one year, and which were compelled by the special peculiarities of a unique industry and the unfair conduct of the cooperative's customers, deprives the cooperative of the qualitative analysis to which it was entitled under the decision of this Court in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961)?

2. Whether a decision that such supply contracts which were not predatory and which were absolutely necessary in order for the cooperative to effectively handle and market the production of its members, nonetheless violates Section 3 of the Clayton Act and thereby nullifies the special protection and immunity granted by Congress to agricultural cooperatives under Section 1 of the Capper-Volstead Act (7 U.S.C. § 291)?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner Dairymen, Inc. ("DI") petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 26, 1985. DI has no parent company, subsidiaries (except wholly owned subsidiaries) or affiliates.

OPINIONS BELOW

The opinion of the court of appeals has not been reported. It is reproduced in the Addendum to this petition. The two relevant opinions of the District Court for the Western District of Kentucky are also reproduced in the Addendum together with the district court's final judgment and injunc-

tion. The first district court opinion is not officially reported, but appears in 1978-1 Trade Cases ¶ 62,053. Nor is the second officially reported. However, it appears in 1983-2 Trade Cases ¶ 65,651.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions involved are Section 3 of the Clayton Act (15 U.S.C. § 14) and Section 1 of the Capper-Volstead Act (7 U.S.C. § 291). These provisions are set forth at the outset in the Addendum.

STATEMENT OF THE CASE

This petition seeks review of the Sixth Circuit's affirmance of the district court's decision that DI's written, one-year full and committed supply contracts which were compelled by the special peculiarities of a unique industry and the unfair conduct of DI's customers and which had a sound and legitimate business basis were nonetheless violative of Section 3 of the Clayton Act solely because of the quantum of a temporary market foreclosure. It also seeks review of the Sixth Circuit's refusal to grant the special antitrust protection and immunity which Section 1 of the Capper-Volstead Act accords agricultural cooperatives such as DI.

A. Course Of Proceedings

This case began in March 1973 when the Government filed a civil antitrust complaint in which the principal claim was that from 1970 to 1972 DI attempted by predatory conduct to monopolize the Grade A raw milk produced and marketed in the southeastern United States in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. The Government's second-

ary claim was that DI's written one-year full and committed supply contracts with its raw milk customers violated Section 3 of the Clayton Act. Add. 3-4.[1]

Following a trial without a jury, the district court in 1978 ruled in favor of DI on each of the claims described above. Add. 26. In dismissing these claims, the district court specifically confronted and rejected the Government's linch pin contention which was that DI's marketing activities (including the supply contracts) on behalf of its members were predatory. Govt. Statement of Contentions (February 28, 1975) at 4; Add. 21.[2] The Government appealed. In September 1981 the Sixth Circuit reversed because in its view the district court had applied an overbroad interpretation of the Capper-Volstead Act in exonerating DI from antitrust liability. *United States v. Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981).

The Sixth Circuit held that the district court's exoneration of DI was legally erroneous on two counts. The first error the court of appeals perceived was in the standard utilized by the district court to determine whether DI's conduct evidenced the specific intent to obtain monopoly power required to find that an unlawful attempt to monopo-

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[1]References to this petition's addendum will be "Add." followed by addendum page number. "TR." refers to the trial transcript.

[2]The Government's willingness to embrace and undertake so high a burden of proof was, of course, a recognition that after the enactment of the Capper-Volstead Act (7 U.S.C. § 291) farmers and their cooperative organizations may conduct their business activities through the enactment of "necessary contracts" in a way which for ordinary business corporations would offend the antitrust laws so long as the cooperative's activities are not predatory. This was the state of the law when the Government's complaint was filed and, except for the Sixth Circuit's decision, remains the law. See discussion *infra* at 21-24.

lize had occurred under Section 2 of the Sherman Act. The court of appeals held that the district court erred in holding that because DI was entitled to the protection of the Capper-Volstead Act proof of predatory conduct was required. All that was required was that the conduct complained of be "anticompetitive" or intended "to stifle competition." 660 F.2d at 194-95. The court of appeals also held that the district court's rejection of geographic submarkets was improper. The court of appeals held that this second error, like the first, required reversal.

The Sixth Circuit also reversed, *a fortiori*, the district court's determination that DI's full and committed supply contracts did not violate Section 3 of the Clayton Act. Although it is not clear from the Sixth Circuit's opinion, the court apparently felt that reversal of the district court's Clayton 3 findings and determination was also required by the failure to conduct a geographic submarket analysis which had tainted the Sherman 2 finding. We infer this from the court's remand instructions. Those directives instructed the district court to identify relevant submarkets and then to determine:

> Whether the full and committed supply contracts used by DI foreclose a substantial share of the market from its competitors and 'tend[s] to create a monopoly in any line of commerce" in violation of Section 3 of the Clayton Act.

660 F.2d at 195.

The law of the case having been established that DI was deprived of every aspect of the special protection from antitrust liability afforded by the Capper-Volstead Act, the district court, on remand, obedient to the Sixth Circuit's instructions, conducted a geographic submarket analysis. However, the district court found that DI's share of the

submarket it identified did not dangerously approach monopoly. Consequently, it again dismissed the Government's Sherman Act Section 2 claim. Add. 55.

The district court utilized its submarket analysis for a second time to determine whether Clayton 3 had been violated. While the court had determined that DI's market share did not dangerously approach monopoly power, it did find that the share of the submarket foreclosed by DI's full and committed supply contracts was large enough—notwithstanding its continuous decline during the 1970s—to substantially lessen competition. It thus ruled that during DI's October 1971 - September 1972 raw milk marketing year, these contracts violated Section 3 of the Clayton Act. Add. 59. DI appealed the district court's Clayton 3 ruling and the Government cross-appealed the Sherman 2 ruling. On February 26, 1985, the Sixth Circuit affirmed the district court in all respects. Add. 75, 77.

Both the district court and the Sixth Circuit condemned DI's supply contracts as violative of Clayton 3 based solely upon DI's quantitative share of the submarket. This *per se* approach effectively ignored such qualitative factors as the unique nature of the milk industry and the limited duration of the contracts, the relative strength of the parties, the extent to which competition flourished despite the contracts and the probable immediate and future effects on competition. Consideration and application of such qualitative factors is required by this court's decision in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961). However, being necessary contracts which did not involve predation, they were entitled to the special protection afforded by the Capper-Volstead Act so that the courts below should never have reached the Clayton 3 issue in the first place. See *infra*, at 21-24.

B. The Nature Of The Industry And The Special Need For Short Term Supply Contracts.

DI is an agricultural milk marketing cooperative association of about 7,500 individual dairy farmers located in the southeastern United States. DI's dairy farmers milk their cows 365 days a year under sanitary conditions which produce Grade A raw milk which is the product market in this case. Unlike any other industry, the production of a cow is an uncontrollable daily occurrence which cannot be turned off, delayed or otherwise controlled on a short term basis. Raw milk is a highly perishable product which must be immediately processed or it spoils. DI sells most of its members' raw milk to proprietary milk processors like Kroger, Winn-Dixie, Sealtest, Pet and Borden. These customers then process the milk, place it in packages and distribute it to retail stores for sale as fluid (drinking) milk products like 2% or skim milk. The remaining amounts of raw milk (called surplus) are processed into butter, cheese and the like. However, raw milk sold to processors is priced under federal and state regulatory systems according to how processors use the milk. Under these classified pricing regulations, processors must pay substantially more for the raw milk they use for fluid purposes than for surplus milk they use for butter, cheese and other non fluid products. In other words, raw milk sold for fluid use is far more valuable to the dairy farmer than milk sold to processors for non fluid use. Add. 3-7.

Indisputably, the amount of milk produced by dairy cows, and therefore the supply of milk available to DI's processor customers, varies seasonally with the reproductive cycle of the cow. Milk production increases after calving in the spring and remains at a high level into summer, when pastures are abundant. The cows' production begins to decline during the summer and reaches its lowest point during the

fall months. In contrast to this production pattern, the demand for fluid milk is greatest in the fall months when schools open and lowest in the summer because of school vacations and the popularity of other beverages. GX 946A.

As a result of the differing patterns of supply and demand, the level of milk production sufficient to meet the needs of DI's customers during the short fall and winter seasons necessarily creates surpluses of raw milk during much of the remainder of the year. The task of managing these milk supplies so that the required quantities are available to DI's customers when they are needed in the short fall and winter seasons and disposing of the resulting surpluses during the remainder of the year is an expensive function referred to as supply balancing. DI performs this function by operating surplus disposal plants which manufacture the seasonal surpluses into butter, cheese and other non fluid products. DI's performance of this function benefits DI's raw milk producing competitors (even though only DI's members bear the cost) by avoiding the price depressing effects which these surpluses would otherwise have on the market. Morgan Tr. 3408-13; Ortego Tr. 4687-93.[3]

For a number of years prior to 1971, DI's large processor customers dealt with DI in a way which unfairly increased the cost of supply balancing for the market borne by DI, forced DI functionally to handle the surplus of its com-

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[3]During periods of peak demand, there is relatively little surplus milk in the southeastern United States. Thus, in order to achieve full yearly plant utilization, processors tend to locate their non fluid manufacturing facilities at locations in the north where raw milk production substantially exceeds fluid demand during the entire year. Relatedly, because of the high water content, it is unnecessarily expensive to transport raw milk any distance for other than fluid use. This expense is avoided by locating manufacturing plants in areas of high year around surpluses.

petitors and made it unnecessarily difficult for DI to plan in advance for the disposal of the seasonal surpluses. The customers would purchase their much needed short supply fall and winter season needs from DI. However, during the remainder of the year when supplies were plentiful, they would purchase their full needs or greatly disproportionate amounts, from other sources even though DI's seasonal surpluses were the inevitable result of producing adequate supplies of milk to meet the short season demands of these same customers. Add. 13-17.

To meet the dilemma caused by this unfair treatment, DI had to choose between two alternatives. DI members could maintain dairy herds sufficiently large to meet only the lower demands of spring and summer. However, this approach would cause extreme shortages and exorbitant milk prices in the fall and winter and would likely cause many consumers, notwithstanding the relative inelasticity of fluid milk prices, to abandon milk in favor of other beverages. Plainly, the antitrust laws do not require sellers to engage in such self-destructive practices. Or, DI could institute a supply contract program which would permit DI's customers the choice for one year of purchasing either (1) their full raw milk requirements from DI except those already purchased from other sources (the grandfather clause) or (2) any lesser amount based upon an agreed schedule of committed monthly volumes. By scheduling monthly purchase quantities for a one-year cycle of supply, DI guaranteed that its members and their competitors would be treated equally. DI selected the second alternative. Add. 17-18.

C. The Effects Of DI's Supply Contract Program.

In the course of its decision that DI's full and committed supply contract program in the 1971-72 marketing year violated Section 3 of the Clayton Act, the district court found that:

(1) Many of DI's processor customers possessed greater economic strength than DI. Add. 59.

(2) DI customers who did not wish to be bound by DI's supply contract program simply purchased their needs from DI's competitors. Add. 55.

(3) During the first year of DI's supply contract program, DI's market share decreased from 60% to 58% and this decline continued unabated each year thereafter. Add. 51-52.[4]

(4) DI was unable to control price or exclude competition. Add. 55.

(5) Because of the countercyclical supply and demand pattern in the milk industry, there were "sound and legitimate reasons" for DI's supply contracts limited to a duration of only one year. Add. 59.

(6) In other cases against agricultural milk marketing cooperatives like DI, the Government later consented

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[4]The district court found that DI's yearly market shares in the relevant geographic submarket were:

1971 - 60.1%	1977 - 52.6%
1972 - 57.9%	1978 - 51.8%
1973 - 56.7%	1979 - 51.9%
1974 - 54.2%	1980 - 49.0%
1975 - 52.1%	1981 - 48.6%
1976 - 53.5%	

This chronic decline in market share was an important factor in the decisions of the courts below that the Government had failed to prove its principal claim that DI had attempted to monopolize in violation of Sherman 2. Add. 54-55. That competition flourished is, of course, inconsistent with the notion that DI's supply contract program tended to the substantial lessening of competition or creation of a monopoly as proscribed by Clayton 3.

to full and committed supply contracts so long as they were limited to one year. Add. 59.

D. The Decisions Of The Courts Below.

Having made the qualitative findings recounted above, the district court accorded them no weight. Instead, it held that DI's supply contracts violated Clayton 3 because they were entered when DI "possessed 59.5% of the relevant submarket and the contracts themselves controlled the purchase of almost 50% of the Grade A milk marketed in the relevant submarkets". Add. 59. The court made it clear that its decision was solely a quantitative one when it also held that DI's contracts would not have violated Clayton 3 "had DI's share of the relevant submarket been significantly less". *Id.*

The essential basis for DI's non Capper-Volstead defense in the district court and for its appeal to the Sixth Circuit was that a supply contract, compelled by the special peculiarities of a unique industry and unfair customer conduct and limited in duration to only one year, inherently lacked the potential for a substantial lessening of competition or the creation of a monopoly. However, the Sixth Circuit affirmed the district court without addressing this defense or even mentioning the limited duration of the contracts. The Sixth Circuit—like the district court—simply concluded that quantitatively the size of DI's market share was sufficiently large as to justify the finding of a Clayton 3 violation. The fact that the district court's other findings (*supra* at 8-10) were plainly inconsistent with a determination that DI's one-year contracts tended to a substantially lessened competition was wholly ignored by the Sixth Circuit. Add. 70-75.

REASONS FOR GRANTING THE PETITION

The district court's decision that DI's one-year supply contracts violated Section 3 of the Clayton Act was based

solely upon the quantum of a temporary market foreclosure. The Sixth Circuit's *per curiam* affirmance thus embraces a purely quantitative approach to Clayton 3 violations which this Court emphatically repudiated in *Tampa Electric Co. v. Nashville Coal Co.*, *supra*, 365 U.S. at 329.

The Sixth Circuit's failure to discuss or even acknowledge the fact that DI's contracts were limited to only one year and were compelled by factors that could occur only in the milk industry sharpens its departure from the decisions of this Court, other circuits and the approach of the Government in similar cases that supply contracts limited to only one year inherently lack the anticompetitive potential condemned by Clayton 3. Furthermore, the decision needlessly constrains the freedom of sellers to ameliorate the effects of manifestly unfair customer conduct by the only means reasonably available.

Even more fundamentally, the decisions below, applying as they do essentially a *per se* approach to the one-year milk supply contracts of an agricultural dairy cooperative, not only invite an unduly narrow and economically unsound approach to Clayton 3 enforcement, they invite nullification of this Court's admonition in *Tigner v. Texas*, 310 U.S. 141, 146-47 (1940) that special legislation favoring agricultural cooperatives reflects a "policy for agriculture very much different from that which underlies the demands made upon industry and commerce by antitrust laws."

By reviewing the decision of the Sixth Circuit, this Court can at once provide much needed guidance in the proper enforcement of Clayton 3, and can amplify the meaning of its widely acclaimed *Tampa Electric* decision, while at the same time restoring to agricultural cooperatives the special protection and exemption from the antitrust laws which

Congress intended when it enacted Section 1 of the Capper-Volstead Act but which the Sixth Circuit took away.

I. The Mere Size Of A Temporary Market Foreclosure Does Not Justify The Application Of A Per Se Rule To Supply Contracts.

DI's supply contracts were not illegal under Section 3 of the Clayton Act unless the "effect of such [contracts] may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 14.

DI's principal contention throughout this case has been that in the unique milk industry supply contracts limited in duration to only one year entered for sound and legitimate business reasons inherently lack the substantial anticompetitive potential proscribed by Section 3 of the Clayton Act. DI buttressed this contention with undisputed evidence that DI's one year contracts in actual fact and operation did not lessen, inhibit or weaken competition to any degree—rather competition flourished and DI's market position was substantially weakened. See *supra* at 8-10.

The district court acknowledged that DI's one year contracts were dictated by the unique peculiarities of the industry and were entered for sound and legitimate business reasons. This being said, the district court held, and the Sixth Circuit affirmed, that the contracts violated Clayton 3 solely because of the quantum of what is, at best, a temporary market foreclosure. Such a *per se* approach to one year contracts in the milk industry is contrary not only to the most recent positions of this Court and lower courts but to the position of the Government in this and similar cases and to sound federal antitrust policy.

Subsequent to the Government's filing of the complaint in this and three other similar milk cooperative cases, it entered into consent decrees which sanctioned the use of one

year full supply contracts with three other large regional cooperatives. *United States v. Associated Milk Producers, Inc.*, 394 F. Supp. 29 (W.D. Mo. 1975); *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. ¶ 61,509 (W.D. Mo. 1977); *United States v. Agri-Mark, Inc.*, 1981-1 Trade Cas. ¶ 63,967 (D. Ct. 1981).

In each of those cases the Government was required by the Tunney Act to certify to the court approving the settlement that the consent decree was in the "public interest." 15 U.S.C. § 16(b)-(n) (1976). In none of these cases did the evidence show—as it does here—that competition was flourishing and the cooperatives' market shares were declining. Furthermore, in *Associated Milk Producers* (*AMPI*) the Government charged, among other things, that the defendant, the nation's largest milk cooperative, had engaged in coercive behavior and unlawful monopolization. *United States v. Associated Milk Producers, Inc., supra*, 394 F. Supp. at 32, n.1; *United States v. Associated Milk Producers, Inc.*, 534 F.2d 113, 114 (8th Cir.), *cert. denied sub. nom. The National Farmers' Organization v. United States and Associated Milk Producers, Inc.*, 429 U.S. 940 (1976). Here, DI was charged only with attempted monopolization. However, the Government was able to certify that AMPI, a cooperative which indisputably possessed far greater market power than DI,[5] could be permitted—consistent with the public interest—to enter one year full supply agreements. Similarly, the injunction suggested by the

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[5]Comparatively speaking, AMPI dwarfs DI. Its membership of over 40,000 is over four times larger than that of DI's highest ever membership. United States v. Associated Milk Producers, Inc., *supra*, 534 F.2d at 114. Mid-America's size is apparent from the fact that it was formed through the merger of some sixty cooperatives. Alexander v. National Farmers Organization, 687 F.2d 1173, 1180 (8th Cir. 1982), *cert. denied*, 461 U.S. 937 (1983).

Government and entered by the district court in this case permits DI to enter into one year full supply agreements with its customers. Add. 63.

The question thus posed is why the Government would permit such agreements if they have the potential to substantially lessen competition as it alleges.[6] The answer must lie in the Government's recognition that supply contracts like DI's limited to only one year's duration inherently lack the anticompetitive potential required by Clayton 3.

Case precedent also recognizes the minimal impact that one-year agreements have on competition. In *United States v. American Can Co.*, 87 F.Supp. 18 (N.D. Calif. 1949) the Government attacked under Sections 1 and 2 of the Sherman Act and Clayton 3 defendant's five year full supply contracts with virtually all of its canner customers in a seasonal industry. The defendant controlled 46.4 percent of

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[6]The answer does not lie in the fact that the decrees and the injunction allow such contracts only if they are not imposed by the cooperatives on unwilling buyers as a condition of sale. Clayton 3 is violated whenever the contracts threaten a substantial lessening of competition. Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 329 (1961). Limiting the use of one year full supply contracts to buyers desiring them will perhaps lower the quantum of the temporary market foreclosure. However, as the Government contended in its brief to the Sixth Circuit in this case, exclusive dealing arrangements foreclosing anywhere from 5 to 61 percent of the market may violate Clayton 3. Govt. Br. at 18. In the *Agri-Mark* case, *supra*, the Government approved a one year full supply contract between the largest cooperative in New England and H.P. Hood, one of the largest if not the largest milk processor in New England. 1981-1 Trade Cas. ¶ 63,967. In any event, as we discuss *infra*, in the instant case, the Government and the district court have both approved substantial market foreclosures so long as they do not exceed 30 days. Thus, in the view of each, the duration—not the quantum of market foreclosure—is the key which the courts below ignored.

the relevant market, being the largest company in the industry, and its contracts foreclosed 40 percent of the market. 87 F.Supp. at 22, 29. The court struck down the five year contracts but approved the contracts for a term limited to only one year because:

> Mindful that requirements contracts are not per se unlawful, and that one of the elements which should be considered is the length thereof, it is only fair to conclude after a careful review of the evidence, that a contract for a period of one year would permit competitive influences to operate at the expiration of said period of time, and the vice which is now present in the five year requirements contracts, would be removed. [Footnote omitted]

Id. at 31.

Shortly before the decision in *American Can*, which the Government did not appeal, this Court had decided the *Standard Stations* case and framed what became known as the "quantitative substantiality" test. *Standard Oil Co. v. United States*, 337 U.S. 293 (1949). In a five to four decision the Court held that Standard Oil's full supply contracts with independent dealers which foreclosed 6.7 percent of the relevant market to competitors violated Clayton 3. 337 U.S. at 295, 314. Because the Court perceived "serious difficulties" in applying them, it rejected as irrelevant a series of qualitative economic factors including:

> (1) Whether competition flourished.
>
> (2) Whether the duration of the contracts conformed to the particular exigencies of the industry in which they were used.
>
> (3) Whether the use of the contracts served legitimate economic needs.

Id. at 308.

Having rejected these factors, the Court focused its decision entirely upon the percentage of the relevant market foreclosed by the contracts and held that the substantial lessening of competition requirement of Clayton 3 is satisfied merely by proof that a not insubstantial part of commerce has been foreclosed. *Id.* at 314.[7]

Four years later in an important sequel to *Standard Stations* this Court retreated from the essentially *per se* quantitative substantiality test. In *Federal Trade Commission v. Motion Picture Advertising Service Co.*, 344 U.S. 392, *reh. denied*, 345 U.S. 914 (1953) the Court condemned five year exclusive screening contracts between advertising film makers and theater owners which foreclosed to competitors 75 percent of all the available outlets throughout the United States as an unfair method of competition violative of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45. 344 U.S. at 395-96.[8] However, because of a compelling business need for exclusive arrangements the Court approved the same contracts so long as they were limited to one year even though the number of outlets for advertising films was limited and competitors had been forced out of business because of their inability to find outlets. *Id.* at 394-96.

Despite this Court's decision in *Motion Picture Advertising*, its *Standard Stations* decision remained fertile ground for extensive critical commentary. For example, the Report

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[7]Although Standard Oil's individual foreclosure was only 6.7 percent, the Court repeatedly emphasized that in combination with its major competitors who employed similar contracts the foreclosure amounted to 65 percent. *Id.* at 295, 309, 314.

[8]There being no lease or sale, Clayton 3 was not implicated. However, a suit under Section 5(a) is the functional equivalent of a Clayton 3 action. 344 U.S. at 394.

of The Attorney General's National Committee to Study the Antitrust Laws (1955) at 147 observed that the quantitative substantiality test of *Standard Stations* amounted to an undesirable *per se* condemnation of requirements contracts which ignored "significant economic and business facts." Six years later, this Court in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961) abandoned the *per se* approach represented by the quantitative substantiality test in favor of a test which would incorporate an analysis and weighing of the qualitative factors which were so soundly rejected in *Standard Stations*.

In *Tampa Electric*, this Court applied what has been characterized as the qualitative substantiality test in holding lawful a twenty-year full supply contract between an electric utility and a coal supplier which the lower courts had found violative of Clayton 3. The Court first stressed the necessity for consideration of not only the amount of commerce foreclosed in the relevant market area but of "the relative strength of the parties" and "the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein." 365 U.S. at 329. The Court then examined the peculiarities of the industry involved, the economic justification for a contract of such long duration and the "particularized considerations of the parties' operations" and concluded that the full supply contract did not offend Clayton 3. *Id.* at 334-35.[9]

In the years following, lower courts have correctly construed *Tampa Electric* as repudiating any approach to

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[9]While the percentage amount of the market foreclosed in *Tampa Electric* was very small, the Court did not rest its decision on the fact that it was insubstantial. *Id.* at 334. Rather, the Court held that "to determine substantiality in a given case" it was necessary to weigh the various qualitative factors. *Id.* at 329.

Clayton 3 which posits liability solely upon the quantum of market foreclosure in favor of an approach requiring close scrutiny of the foreclosure in the light of the one-year duration of the challenged contracts, their business justification and the nature of the industry involveed.[10] *E.g. M&H Tire Co. v. Hoosier Racing Tire Corp.*, 733 F.2d 973, 985-86 (1st Cir. 1984); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1252 (3d. Cir. 1975); *Susser v. Carvel Corp.*, 332 F.2d 505, 516 (2d Cir. 1964), cert dismissed, 381 U.S. 125 (1965).[11]

Finally, the injunction proposed by the Government and subsequently entered by the district court allows DI to require as a condition of selling any milk to its customers that the customers enter supply contracts so long as they do not exceed 30 days and so long as the customers are given the opportunity to purchase less than a full supply. Add. 63. The supply contracts found unlawful thus differed from the ones now approved by the Government and the district court only in respect to their duration, *i.e.* 30 days versus one year. See *supra* at 8. Additionally, the injunction allows one year full supply contracts renewable by option year-to-year if both parties desire them. The Government's proposal, and the district court's entry of an injunction approving supply contracts which differ from the ones found illegal only by reason of their duration constitutes admissions that the duration of a requirments contract is an overwhelmingly

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[10]This approach accords fully with the *Motion Picture Advertising* case, *supra*, 344 U.S. at 394-96 and *American Can*, *supra*, 87 F.Supp. at 29, 31.

[11]*Cf.* Areeda & Turner, III ANTITRUST LAW 225 (1978) suggesting that in determining the substantiality of a market foreclosure, the courts should recognize that "the mere fact that a foreclosure is large should not condemn the use of exclusive dealing arrangements that are reasonable in duration relative to the justification for them."

important qualitative factor entitled to great weight in the determination of whether the quantum of a temporary market foreclosure truly tends to a substantial lessening of competition. Such is plain from the obvious fact that 30 day supply contracts may result in a quantum of temporary market foreclosure equal to that involved in one-year contracts. The difference between the two, however, is that the 30 day contracts do not address the economic problems presented by the one-year countercyclical variation in demand and output. The failure of the courts below to give any weight whatsoever to those qualitative factors was thus plain error which compounded the courts' departure from *Tampa Electric*.

II. The Application Of A *Per Se* Approach To Section 3 Of The Clayton Act Was Particularly Inappropriate In This Case.

The automatic condemnation by the courts below of contracts limited to one year with a sound and legitimate business basis is all the more inappropriate here because the unique nature of the milk industry at once dictates the use of such contracts and establishes that they do not create a truly comparable threat to competition.

There is probably no other industry where (1) the seller's production occurs 365 days a year and can be stopped only by destroying the production facilities (the cows) and (2) the seasonal variation in demand and production is countercyclical, *i.e.*, demand is highest when production is lowest and vice versa. The inevitable result of this phenomenon is that when DI's farmer members maintained dairy herds large enough to meet the short production season needs of its customers they necessarily produced surpluses during the remainder of the year. Because the disposal of these surpluses by DI is expensive, basic fairness and sound economics are best served by allowing as a condition of sale

the imposition of a contractual obligation which comprehends one full cycle of yearly seasonal fluctuations in demand and output.[12]

Superimposed on, and a part of the uniqueness of the milk industry is the unfair economic advantage which DI's competitors received in the absence of the one year supply contracts. When DI's large customers purchased their peak needs during the short production season from DI but favored DI' competitors with their flush season requirements, the functional effect was to require DI to bear the cost of disposing of not only its own surpluses but those of its competitors.[13] DI was thus benefiting its competitors in two ways. First, by incurring the cost of operating its own surplus disposal facilities, DI avoided the price-depressing effect on the market of these surpluses. Second, by being required functionally to handle the surpluses of its competitors, DI was providing them with a substantial subsidy.

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[12]The situation posed here is operationally little different from a manufacturer who understandably, refuses to incur the cost of producing lawn mowers to the specifications of a gardening company which agrees only to lease the equipment during the spring, summer and early fall.

[13]For example: assume a processor purchases 100 units of raw milk from each of DI and DI's competitors during the short production season, or a total of 200 units representing the total aggregate output of the two groups. Because of the biology of the cow and related factors, each group will produce about 120 units during the following flush season, or a total of 240 units. Assume that the processor's needs remain at 200 units. If the processor returns 20 units of surplus to each group, then each is treated fairly. The unfairness arises when the processor alters its purchasing pattern by accepting all 120 units produced by DI's competitors and reducing purchases from DI to only 80 units. This forces DI to dispose of 40 units (120 less 80), which is the surplus attributable to the entire utilization of the processor's plant (240 less 200), not just the 20 units of surplus produced by DI.

Thus, the essential effect of DI's one year supply contracts was not to deprive its competitors of a market but to require them to bear the cost of disposing of their own surpluses occasioned by the unique peculiarities of the industry. In a case tried on a nearly identical record, the court under the circumstance recounted above had little difficulty in concluding that DI's supply contracts did not substantially lessen competition and "were necessitated by the nature of milk marketing and the course of dealings between DI and its customers." *Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F.Supp. 608, 633 (MD.Ga. 1981), *aff'd per curiam*, 715 F.2d 520 (11th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1327 (1984).[14]

As we discuss more fully, *infra*, by granting certiorari, this Court will be able to provide much needed guidance in the accommodation of the antitrust laws to the special needs of a unique industry. As this Court stated in *Tigner v. Texas*, 310 U.S. 141, 146-47 (1940):

> At the core of all these enactments lies a conception of price and production policy for agriculture very much different from that which underlies the demands made upon industry and commerce by antitrust laws. These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process.

III. Because DI's Supply Contracts Were Not Predatory And Because They Were Essential To DI's Marketing And Handling Of Its Members' Milk, They Were Exempt From Antitrust Liability By Reason Of The Special Exemption Afforded By Section 1 Of The Capper-Volstead Act.

Chief among the enactments referred to by this Court in the *Tigner* case, *supra*, 310 U.S. at 146 is the Capper–

[14]Subsequent to the trial, the plaintiff abandoned its Clayton 3 claim and proceeded only under Sections 1 and 2 of the Sherman Act.

Volstead Act which allows farmers, free of the constraints of the antitrust laws, to "act together in associations . . . in collectively processing, preparing for market, handling, and marketing [their] products. . . ." These associations or cooperatives "may have marketing agencies in common . . . and may make the necessary contracts and agreements to effect such purposes. . . ." 7 U.S.C. § 291. Consistent with the Capper-Volstead Act and free of the proscriptions of Sections 1 and 2 of the Sherman Act, dairy cooperatives like DI may fix prices among themselves and may deliberately pursue, achieve and maintain a monopoly of the production and sale of milk by recruitment of farmers, by merger between or among cooperatives, by joint cooperative marketing action among several cooperatives or by other nonpredatory means even though such deliberate price fixing or accretions of market power by private businessmen in nonagricultural industries would constitute an unreasonable restraint of trade and monopolization or conspiracy or attempt to monopolize in violation of Sections 1 and 2 of the Sherman Act. *Fairdale Farms v. Yankee Milk, Inc.*, 635 F.2d 1037, 1039-45 (2d Cir. 1980), *cert denied*, 454 U.S. 818 (1981).

Indisputably, Section 1 of the Capper-Volstead Act allows agricultural cooperatives like DI to combine with other agricultural cooperatives to achieve wider markets and better prices in a manner and to a degree not permitted ordinary business corporations. *Maryland and Virginia Milk Producers Association v. United States*, 362 U.S. 458, 466-67 (1960); *Fairdale Farms v. Yankee Milk, Inc., supra*, 635 F.2d at 1040-45. Such a departure from the normal proscription of the antitrust laws reflects the plain language of Capper-Volstead which permits farmers and their cooperative associations to "act together" in the collective preparation and handling for the market and the marketing of their members' production, and in the pursuit of such legitimate

goals to "make the necessary contracts and agreements to effect such purposes. . . ." Thus Congress, in enacting this special legislation to protect farmers and their associations from the traditional reach of the antitrust laws, decreed that agricultural cooperatives could enter agreements which if otherwise lawful under the rule of reason test applicable to Sherman Act Section 1 cases would *a fortiori* be exempt from the reach of other antitrust statutes such as Section 3 of the Clayton Act, not only because they were reasonable but because they were "necessary." *Kinnett Dairies, Inc., supra,* 512 F.Supp. at 633.

In erroneously depriving DI of the special protections of the Capper-Volstead Act, the Sixth Circuit thus needlessly required DI to justify its supply contracts under an approach which focused entirely upon the quantum of a perceived market foreclosure rather than upon the core question of whether the contracts were "necessary" ones in DI's handling and marketing of its members' products. This is the precise question which the court confronted in the *Kinnett* case, *supra,* at 633, when it held that supply contracts which are reasonable qualify for the protection of the "necessary contracts" provision of Section 1 of the Capper-Volstead Act.

The decisions of the courts below thus involved a double-barrelled error. First, the courts applied a purely *per se* approach to DI's supply contracts based upon the mere quantum of the temporary market foreclosure. See discussion, *supra,* at 12-19. Second, they wholly ignored the fact that an agricultural cooperative, consistent with the provisions of the Capper-Volstead Act, may enter into the contracts "necessary" to the effective handling and marketing of their members' products.[15] The necessity for the DI con-

[15]Obviously, we are not suggesting that contracts which are unrea-

tracts having been established by overwhelming and undisputed evidence (see discussion *supra*, at 19-21), it necessarily follows that they did not offend Section 3 of the Clayton Act. As the court held in the *Kinnett* case, *supra*, at 633:

> D.I.'s one-year written supply contracts and its other dealings with handlers including Kinnett were legitimate means by which D.I. marketed the milk of its members. In particular, the written contracts were reasonable in duration and were necessitated by the nature of milk marketing and the course of dealings between D.I. and its customers. They did not operate to substantially lessen competition or to unreasonably restrain trade and as such were *necessary contracts* fully protected by the Capper-Volstead exemption. Emphasis added.

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sonable so that they would offend Section 1 of the Sherman Act are nonetheless saved by the "necessary contracts" proviso of Section 1 of the Capper-Volstead Act. What we are saying, however, is that contracts which are reasonable under the Sherman Act thus qualify for the special protection of the Capper-Volstead Act so long as they are "necessary" ones.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the Sixth Circuit.

Respectfully submitted,

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May 28, 1985

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May, 1985, three copies of this Petition and Addendum were mailed, postage prepaid, to The Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; to the Assistant Attorney General, Antitrust Division; and to the Chief of the Appellate Section, Antitrust Division, United States Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

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ADDENDUM TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Section 3 of the Clayton Act, 15 U.S.C. §14

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Section 1 of the Capper-Volstead Act, 7 U.S.C. §291

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements;

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE**

**Civil Action
No. 7634 A**

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAIRYMEN, INC.,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION

This action, brought by the United States seeking permanent injunctive relief against certain alleged monopolistic practices followed by the defendant during the years 1970, 1971 and 1972, was filed on March 29, 1973. A trial of the action took place in 1976 and consumed 28 trial days and involved the testimony of 38 witnesses, as well as the filing of 33 depositions and 1,107 exhibits.

While plaintiff alleges violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. Secs. 1 and 2, and Section 3 of the Clayton Act, 15 U.S.C. Sec. 14, it states in its findings of fact and conclusions of law that the principal charge is that Dairymen, Inc., hereinafter known as "D.I.", attempted to monopolize trade and commerce in the production and sale of raw Grade A milk in the Southeastern United States, in violation of Section 2 of the Sherman Act by means of anticompetitive and predatory practices and unlawful agreements.

The Court has jurisdiction over the subject-matter and parties, and venue is properly laid in the Western District of Kentucky. See the stipulation of the parties and the statutes cited therein.

D.I. is an agricultural cooperative marketing association of dairy farmer members within the meaning of the Capper-Volstead Act, 7 U.S.C. Secs. 291 and 292, and Section 6 of the Clayton Act, 15 U.S.C. Sec. 7, and has been determined by the United States Secretary of Agriculture to be a qualified cooperative association under effective milk marketing orders.

It was formed in 1968, through a consolidation of a group of eight other such associations under Chapter 272 of the Kentucky Revised Statutes.

D.I., at all times pertinent, has been principally engaged in the marketing of Grade A milk produced by its members. This includes the transportation, distribution, sale and processing of such milk in the Southeastern United States.

D.I. provides certain services exclusively to its members, which include technical assistance to members to increase members' productivity and maintain quality standards, transportation of members' milk to its destination, sales outlets for its members' milk, the operation of its own laboratory facilities to test members' milk and the distribution of the revenue from the sale of members' milk to individual members.

D.I.'s membership during the fiscal years 1969-70 to 1971-72 varied from 9,284 members in the first year to 8,762 members in the latter year, and the revenues received amounted to over $240,000,000 in the first year, and to almost $391,000,000 in the latter year. In the first fiscal year mentioned, D.I. marketed approximately 3,646,000,000 pounds of milk and in the second year approximately 5,220,000,000 pounds of milk.

The member-producers and marketing facilities of D.I., during the years 1970-72 were located in Alabama, Georgia, Kentucky, Virginia, North Carolina, South Carolina, Tennessee,

Mississippi, and Louisiana, and a small number of counties in Indiana, West Virginia, Illinois and Missouri.

The states of Alabama, North Carolina, South Carolina, Virginia, and Louisiana regulated the sale of Grade A milk by State regulations, and the balance of the territories where D.I. facilities and members were located were regulated, with the exception of 2% of the territory, by Federal Milk Marketing Orders.

During the period 1968-72, D.I. merged or consolidated with ten other milk marketing cooperatives located in the southeast, whose annual milk volume in terms of pounds was 1,818,300,000.

D.I. itself engages in fluid milk processing and bottling for Class I and II sales to retail outlets. This aspect of its operation was conducted by its Consumer Packaging Division which was established June 1, 1970 and taken over by Flav-O-Rich, Inc., D.I.'s wholly owned subsidiary, in 1972.

The quality of raw milk to be used for the production of fluid or bottle milk products is regulated by State health laws. Raw milk, which meets the quality standards for fluid use, is designated as "Grade A" milk. The health and sanitation requirements for the production, storage and transportation of Grade A are stricter than those for the production, storage and transportation of non-Grade A milk. Raw milk, which does not meet these quality standards and cannot be sold as fluid milk, is designated as "manufacturing grade" milk. Non-Grade A milk is called Grade B, C or ungraded milk, depending on the area.

State health law precludes the receipt of non-Grade A milk at any plant engaged in the production of fluid Grade A milk products. Therefore, a fluid milk processing plant which also produces manufactured products may only use Grade A milk.

Grade A milk production requires different facilities than does the production of Grade B milk, including the installation and refrigeration of bulk tanks and is also more costly to produce, store and transport than Grade B milk, and requires a

higher capital investment than Grade B milk. Only Grade A milk is regulated under the Federal or State Milk Marketing Commissions. The dairy industry recognizes that the marketing of Grade A milk is distinct from the marketing of Grade B milk. On the other hand, Grade A milk is often used for manufacturing purposes just as is Grade B milk.

Milk producers are recognized as either Grade A milk producers or Grade B milk producers, and individual milk producers do not simultaneously produce Grade A and Grade B milk from the same facilities, and, generally, do not produce both types of milk on the same farm.

Until March, 1973, D.I. neither handled nor supplied Grade B milk, and was engaged almost exclusively in the Grade A business, except when an individual's milk did not meet Grade A health requirements. In 1973, D.I. formed a new subsidiary, DI Manufacturing, Inc., to market manufacturing grade milk.

The price paid for Grade A milk is usually about 40% more than that paid for non-Grade A milk, and, as a result, there has been during the past few years a substantial increase in the percentage of Grade A production as compared with non-Grade A production. For example, in 1968 70% of the total milk production in the United States was Grade A milk, whereas in 1975 80% was Grade A milk. Also, in the thirteen states described in defendant's findings of fact No. 230, a significant increase in the percentage of Grade A milk production as contrasted with non-Grade A milk production is shown. Also, it is true that a substantial amount of Grade A milk produced in the United States is utilized for manufactured dairy products, that amount being approximately 34% in 1975.

The price which Grade A milk received in Federal Order states is based upon what is known as the "Minnesota-Wisconsin pricing formula" which involves the price paid by 100 dairy manufacturing plants in Minnesota and Wisconsin for non-Grade A milk, to which amount is added fixed amounts by the Federal Regulatory Authorities. Also, it should be noted that the cost of converting a farm from non-Grade A production to

Grade A production is not substantial as compared with the initial cost of investing in the cows, farm land and dairy equipment necessary to produce raw milk.

There is much controversy between the plaintiff and the defendant, not only with reference to what constitutes the relevant product and line of commerce, but also as to what constitutes the relevant geographic markets and submarkets, if any. The record indicates that defendant produces Grade A milk in all of the southeastern states with the exception of Florida, and in addition has producers in South Indiana, Southern Illinois, Eastern Missouri and West Virginia. In addition it is shown that defendant markets its milk in these areas and also in the Tampa Bay area in Florida, and in certain parts of Maryland and in Cincinnati, Ohio.

The milk produced in Virginia, North Carolina, South Carolina, and Alabama and sold there was subject to regulations by the State Market Commissions of those states, whose regulations vary considerably from those imposed under the Federal Orders which are applicable in Georgia, Kentucky, Tennessee, Mississippi, and Louisiana, and also in localities in those states such as Louisville, Lexington, Paducah, Chattanooga, Nashville and New Orleans.

The plaintiff contends that the relevant geographic market or submarket is limited to those areas in the southeast which have just been described in the preceding sentence. The basis for the plaintiff's claim is that only in these areas did the defendant attempt to impose exclusive supply contracts upon its processors, and that the difference in regulations is so great that the State Regulated areas must be considered in isolation from the Federal Order areas.

Defendant, on the other hand, contends that it has substantial sales in both the State Regulated areas in the southeast and in the Federal Order areas in the southeast, and that milk moves constantly between State Regulated areas and Federal Order areas, and also that milk moves in substantial quantities

from Minnesota and Wisconsin as well as other northern states to the southeastern states.

The plaintiff attempted to show that as of May and October, 1971, the states and localities which it deemed to constitute the relevant geographic market or submarket received approximately 5% of their shipments of milk from sources outside the areas themselves. On cross-examination, however, witness Eisenstat admitted that he had failed to take into account substantial movements from other order areas which would have indicated that at least 10% of milk sold in the Federal Order areas came from sources outside those particular areas and that at least 12% in October, 1971, would have come from areas outside the particular areas of sale.

In addition, there was testimony to the effect that processors with whom defendant was attempting to obtain exclusive supply contracts were able to supply a part of their needs by shipments of milk from the Minnesota-Wisconsin area. See for example the testimony relating to Broughton, Sealtest-Nashville, Borden-Jackson, and Sealtest-Chattanooga.

Pertinent to these comments is the observation that the southeastern area states, during the late summer and autumn, do not produce enough Grade A milk to meet the demand in their areas, and that consequently Grade A milk is shipped from the surplus states of Wisconsin, Minnesota, Iowa and Missouri to the southeastern states although this involves a cost of approximately 1½ cents per hundred weight for transportation. Of course, the processors and handlers prefer to purchase their milk from nearby sources, but the great expansion of the interstate highway system, plus the construction of efficient dairy tankers has made practical the movement of milk in commercial quantities from the midwestern states to the southeastern areas, as evidenced by the fact that the National Farmers Organization, hereinafter referred to as N.F.O., one of defendant's competitors, was able to quote a price for Grade A milk delivered from Wisconsin to Nashville which was 10% less than the price quoted by defendant for locally supplied milk.

The cases which are applicable to the issue of what constitutes a relevant geographic market or submarket hold that the relevant geographic market is the market in which competitors effectively compete, and in which the seller supplies and to which the purchaser can practically turn for supplies. See *Tampa Electric Company v. Nashville Coal Company et al*, 365 U.S. 320 (1961) and *Standard Oil Company v. United States*, 337 U.S. 293 (1949). However, this concept of a relevant geographic market is not ordinarily susceptible to a metes and bounds definition. See *Times-Picayune, v. United States*, 345 U.S. 594, 611 (1953).

Despite the elusiveness of the concept of a relevant geographic market or submarket, and the difficulty in determining what the relevant product or line of commerce is, see *Brown Shoe Company v. United States*, 370 U.S. 294 (1962); *United States v. Alcoa*, 377 U.S. 271 (1964); and *Reynolds Metals Company v. Federal Trade Commission*, 309 F.2d 223 (C.A. D.C. 1962), the Court makes the following determinations.

First, as to the relevant geographic market, the Court finds that it is made up of all of the states in the southeast with the exception of Florida, and, in addition, comprises the southern portion of Indiana and Illinois, as well as a very small part of eastern Missouri. The area, therefore, is more specifically defined as being Virginia, Georgia, Alabama, North Carolina, South Carolina, Mississippi, Louisiana, Tennessee, Kentucky, Southern Indiana, Southern Illinois, and Eastern Missouri. The Court, having found a relevant geographic market, now proceeds to consider the claim of the plaintiff that because of the market domination by defendant in Federal Order Areas 7, 11, 46, 90, 94, 98, 99, 101 and 103, with respect to Grade A milk, that such areas should be considered as a relevant submarket.

Statistics introduced by the plaintiff show that the defendant in 1971 marketed in the Federal Order areas 7, 11, 46, 90, 94, 98, 99, 101, and 103 Grade A milk which was pooled in proportions ranging from 73.7% of the total to 99.6% of the total. While these statistics would indicate that defendant had a

monopolistic position in these particular Federal Order areas, Exhibit PDX-40 showing production of Grade A milk and D.I.'s share of that production reveals a substantially different situation.

Exhibit PDX-40 is expressed in terms of the states concerned rather than Federal Order areas. It indicates that in 1971, D.I. produced approximately 57.6% of the Grade A milk in Kentucky, 72.5% in Tennessee, 65% in Georgia, 61.3% in Mississippi, 41.2% in Louisiana, and 44.5% in Virginia. Since the tables relied upon by the plaintiff and defendant are different, in that plaintiff's reliance is upon specific Federal Order areas, whereas defendant's is upon the concept of each state being a unit, and since plaintiff's argument rests upon percentage of marketed milk which was pooled and defendant's concept rests upon production, the figures are almost irreconcilable.

It is interesting to note that in Kentucky and Mississippi, the Government's exhibits, based on percentage of milk pooled, showed that D.I.'s share of the Grade A market was 73.7% and 75% respectively. Defendant's exhibits, based on percentage of production, showed D.I.'s share of production as 65% and 61.3% respectively.

Cases such as *United States v. Pabst Brewing Company*, 384 U.S. 546 (1966) and *Standard Oil Company v. United States*, *supra*, are not of assistance in determining what constitutes a relevant submarket. Both *Pabst* and *Standard Oil*, *supra*, were cases brought under 15 U.S.C. Sec. 18, which refers specifically to lessening of competition in any part of the country. Under that very broad statute, the concept of relevant geographic submarkets has been developed.

This Court has been unable to find any specific instances of the use of relevant geographic submarkets in cases involving 15 U.S.C. Sec. 1 and 2 and 15 U.S.C. Sec. 14, which refer generally to unlawful restraints imposed upon commerce. It would seem that 15 U.S.C. Sec. 18 was enacted to prevent the anticompetitive effect of mergers which would in any way diminish competition substantially in any part of the country, whereas

the sections of the Sherman and Clayton Acts, upon which plaintiff relies, are not couched in such local and pragmatic terms.

We conclude that plaintiff's contentions regarding a relevant geographic submarket should be rejected. If they were to be accepted, logic would require that the Court examine in detail the market statistics in each and every geographic subdivision in which defendant competes, and might even require the establishment of many relevant geographic submarkets which could be as small as the city limits of a municipality or the boundaries of a county. While such a result would be acceptable in a suit brought under 15 U.S.C. Sec. 18, we do not believe that it would follow that it is acceptable here.

With reference to what constitutes the relevant product market, *Brown Shoe Company v. United States, supra,* points out that the Court must consider "such practical indicia as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." Also, to be considered are "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." See 370 U.S. at p. 325.

The Court finds that, while Grade A and non-Grade A milk both originate in raw milk, they have unique production facilities, distinct customers, distinct prices and specialized vendors. However, this finding must be qualified by noting that in many instances the customers for Grade A milk are often customers for non-Grade A milk, and that in many instances the sellers of Grade A milk can also be sellers of non-Grade A milk, as is exemplified by the practices of N.F.O. and by D.I.'s action in setting up a unit within its organization to sell non-Grade A milk. Also, as noted before, Grade A milk can be used for the same purposes as non-Grade A milk, and the facilities in which non-Grade A milk is produced can be changed without great cost to facilities for the production of Grade A milk.

In *Brown Shoe Company v. United States, supra,* which is the closest case in point of fact which the Court has found, the

Supreme Court held that men's, women's and children's shoes each constituted separate relevant lines of commerce, since they were recognized by the public as being distinct, manufactured in separate plants, had characteristics peculiar to themselves rendering them non-competitive with the others, and each being directed toward a distinct class of customers.

In the case at bar, the question is quite close and is not as clear as that in *Brown, supra*. Exhibit GX-30 prepared by the Farmer Cooperative Service of the United States Department of Agriculture tips the scale toward a finding that Grade A milk is the relevant product. In that Exhibit, it is pointed out that the demand for milk can be divided into two primary markets. The first is that for Class I sales of fluid milk products, and the second is the domestic market for manufactured milk products. As stated in the Exhibit, page 23, "(t)his system administratively segregates the market for fluid milk (class I) from that for manufacturing milk. The theoretical basis for this segregation is that the demand for fluid milk products is more inelastic than that for manufactured milk products."

Prior to a discussion of defendant's conduct which allegedly violates Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, further reference must be made to defendant's share of the Grade A milk sales market in the relevant geographic area. As noted before, there is an irreconcilable conflict between the statistics introduced by the United States and those introduced by the defendant. The Court finds that defendant's share of sales of Grade A milk in the relevant geographic market as previously defined by the Court was 57% in 1971, and that it exceeded 70% in the following distinct Federal Order areas: Louisville-Lexington-Evansville, Georgia, Knoxvill, Appalachia, Paducah, Chattanooga, Nashville, Mississippi and New Orleans, and in the State Commission area of Virginia.

We note in this connection that according to a statement made in Exhibit GX 930, introduced by the plaintiff, a cooperative must have at least 75% of the supply in a particular

market before it can enforce its wishes as to premiums to be paid its handlers. By way of contrast, we observe that in *Bergjans Farm Dairy Company v. Sanitary Milk Producers*, 241 F.Supp. 476 (E.D. Mo. 1965), aff'd. 368 F.2d 679 (8th Cir. 1966), a 55% share of the market with respect to dairy products was held to constitute market dominance.

The United States claims in its brief that the defendant engaged in five types of conduct during the years 1969-1973 which violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. These violations may be broadly described as follows:

1. Defendant's attempts to force processors to execute full-supply contracts in order to eliminate competition and control prices.

2. Defendant's alleged foreclosure of competition by acquiring customers and potential customers from its competitors.

3. Defendant's contractual agreements with independent contract haulers prohibiting the transportation of non-member milk.

4. Defendant's use of pooling on Mississippi and Nashville.

5. Defendant's restrictive membership agreements and practices.

During the period 1969-1971, defendant entered into various negotiations with its customers, which the Government characterizes as refusal to deal and related exclusionary tactics. The Government points to dealings with six processing plants, to wit: Pet Plant in Jackson, Mississippi, a Mayfield Dairy Plant in Athens, Tennessee; Sealtest Plants in Nashville, Atlanta and Chattanooga, and a Broughton Plant in Lexington, Kentucky.

In November, 1969, defendant which was then supplying approximately 55% to 60% of the fluid milk needs of the Pet-

Jackson Plant, gave that plant notice that it would cut off its supply of milk within 30 days if Pet-Jackson did not purchase its full supply from defendant. The threat was never carried out, since negotiations commenced between defendant and Pet-Jackson, which finally resulted in an oral agreement wherein defendant agreed to allow Pet-Jackson to continue buying milk from Gulf Coast Dairymen's Association, and independent dairy farms, as well as adding two new producers to its list of suppliers. No full-supply agreement or exclusive-supply agreement was entered into, and the evidence is clear that prior to the threat of withdrawal of supplies by defendant that Pet-Jackson had been increasing its purchases from Gulf Coast and independent producers, so that in February, 1970, defendant's percentage of sales of the fluid milk sales to Pet-Jackson was down to 48.5%

It should be noted that Pet-Jackson threatened to file suit against defendant to require it to continue its shipments of milk to Pet-Jackson. The evidence tended to show that Pet-Jackson diverted defendant's milk when it had surpluses and did not do so with milk supplied to it by Gulf Coast or independent producers. Also, there was some proof tendered to show that Pet-Jackson had turned away split loads of milk tendered to it by defendant.

Defendant, and its predecessor cooperative, had, for many years prior to 1969, supplied Sealtest Nashville with the majority of its fluid milk needs. Sealtest Nashville distributed its fluid milk products in Nashville and also in Knoxville and Chattanooga, as well as in the Paducah, Kentucky area. It had been granted a price differential by defendant's predecessor, which allowed it to compete in Knoxville and Chattanooga. In June, 1969, it was told that the price differential would no longer be continued. Sealtest Nashville then undertook to place some 10% of its sales with N.F.O. When defendant heard of the expected purchases from N.F.O., it put Sealtest Nashville on an irregular basis, insofar as supplying it milk was concerned, and notified it that all milk sold would be at Class I prices.

At that time, the difference between Class I and Class II prices under the applicable Federal Order was $1.58 per hundred weight.

When Sealtest-Nashville complained to defendant about paying Class I prices, D.I. advised Sealtest-Nashville that it would have to purchase 35,000 gallons a day to receive the price differential which it had previously enjoyed. Also, Sealtest-Nashville was told that if it wished milk from defendant it would not be allowed to purchase milk from approximately 15 former members of defendant who had defected to N.F.O. Subsequently, in April, 1970, Sealtest-Nashville and defendant entered into an agreement restoring the price differential and granting to defendant the right to supply the plant with all milk, except that supplied by nine genuine N.F.O. producers.

During the period that defendant was attempting to secure the full-supply contract from Sealtest-Nashville, that plant was purchasing 2,400,000 lbs. of fluid milk from Tennessee Valley Milk Producers in the month of February, 1970, as well as 462,000 lbs. from N.F.O. In addition, it should be mentioned also that Sealtest gave defendant no notice as to when their sales were to be reduced and that although its officers maintained to representatives of defendant, that it had a commitment to N.F.O. for a year, it quickly dissolved that alleged commitment as soon as it had entered into its agreement with defendant. The inference is strong that Sealtest used the N.F.O. agreement as a wedge to secure concessions from defendant, just as defendant was utilizing its strong supply position to compel Sealtest to accept its tendered full-supply agreement.

The Mayfield incident involved a local milk processor which was regulated under the Chattanooga Federal Order, and which purchased approximately 50% of its fluid milk from defendant and the balance from a group of independent producers. In September, 1970, Mayfield was advised by defendant that it would be given 30 days to consider entering into a full-supply agreement. The time limit was extended to De-

cember, 1970. During this period, the parties entered into negotiations over service charges which finally were agreed upon on the basis of two-thirds of the amount asked for by defendant. This agreement was entered into March 17, 1971, and contained a provision to the effect that Mayfield would not take on additional independent dairy farmers as sources of supply over and beyond the amount being supplied by the independent dairy farmers who were then selling to Mayfield. Insofar as the taking on of additional independent producers is concerned, the President of Mayfield testified that it had not been the policy of the company to solicit additional independant producers, but that some 30 producers were turned away because of the agreement with defendant and its attendant "grandfather clause."

In the autumn of 1970, Sealtest-Atlanta was purchasing 60% of its fluid milk supplies from defendant. It then decided to purchase 10% of its milk supply from N.F.O., thereby replacing an equivalent purchase of defendant's supply to the plant. N.F.O. also agreed to supply Sealtest with a reserve supply which would represent 50% of the plant's needs.

When defendant found out about the intention of Sealtest to bring in 10% of its supplies from N.F.O. sources, it advised Sealtest that it would not continue to supply it with milk, unless the same amount of milk (221,000 lbs. per day) would be bought from it by Sealtest. There is a dispute as to whether Sealtest had made arrangements with N.F.O. for the reserve supply prior to the time defendant advised Sealtest of its intentions.

The Court believes that the preponderance of the evidence is to the effect that Sealtest was using this reserve supply as an "ace-in-the-hole" in the event that D.I. cut off its milk and that it had already made arrangements for the reserve supply prior to D.I.'s threat to cut off the milk.

Within a week after D.I. had threatened to discontinue its regular shipments to Sealtest and had, in fact, done so, and agreement was entered into between it and Sealtest in January,

1971, resulting in the elimination of the N.F.O. supply and the regular resumption of shipments by defendant to the Sealtest Plant.

In the spring of 1971, Sealtest-Chattanooga had been receiving from defendant all of its fluid milk supplies. However, it received an offer from N.F.O. to replace one-third of its needs with N.F.O. milk at prices less than defendant's. Sealtest agreed to do this, thereby provoking defendant's refusal to sell any milk to the Chattanooga Plant if the N.F.O. milk was received. When the milk was received, defendant did withhold its supply from the Chattanooga Plant and subsequently received all of its supplies from N.F.O. before going out of business in 1973. There was proof to the effect that defendant did, on one occasion, reduce the volume of milk it was supplying to Sealtest-Nashville and that may have been done to retaliate for the action of the Sealtest-Chattanooga Plant.

Following the sequence of events described above, defendant's Board of Directors, in July, 1971, authorized its management to enter into written supply agreements with its regular customers. These agreements would have required a handler to purchase its full supply of Grade A milk from defendant with the exception of milk then being purchased from identified nonmembers. There was also contained in the agreements a price equalization charge which imposed penalties on handlers who purchased less than 95% of their milk from defendant. These charges increased in proportion to the customers' purchases from defendant's competitors.

In order to induce handlers to enter into these agreements, defendant notified them that effective September 1, 1971, milk supplied would be on a day-to-day basis, although orders would be accepted on each Friday for the following week, but the day-to-day deliveries would depend on available supplies and alternative outlets. Handlers were notified that defendant took this position, since the sales agreement had not been executed for the twelve months beginning September 1, 1971.

Defendant, in an attempt to secure the agreement of its predecessors to the full-supply contracts, withheld all or a

substantial portion of the Grade A milk supplies from those handlers whoe had not signed the agreement. However, difficulties were encountered in that Holland Dairy and Borden brought suits alleging that these withholding actions violated the Sherman and Clayton Acts, and as a result received temporary restraining orders requiring defendant to discontinue its withholding actions. After these suits were brought, defendant turned to a committed-supply or stated-volume agreement which was in effect for twelve months and which generally specified that the plants would purchase amounts in line with the amounts purchased in the previous year.

Defendant entered into 91 written supply contracts with handlers, and of these, 60 agreed to the initial full-supply agreements, and 22 agreed to the committed-supply agreements, although defendant offered to handlers who had already executed the full-supply agreement the option of replacing these agreements with the committed-supply type of agreements. It is admitted by the United States that the 22 committed-supply agreements are not inherently predatory, but it is contended that they were part-and-parcel of defendant's attempt to monopolize.

Both the initial full-supply agreements and the committed-supply agreements contain provisions that allowed the handler to continue to receive milk furnished by active producers who were not members of the defendant. The basic difference between the two forms of contract is that the full-supply contract requires the handler to purchase all of its Grade A milk supplies from defendant, with the exception of the supplies furnished by independent producers who had been supplying milk prior to the date of the contract, whereas the committed-supply contract requires the handler to purchase a stated volume of Grade A milk from defendant, with the exception of milk furnished by independent producers under the "grandfather clause".

The United States relies strongly upon *North Texas Producers Association v. Metzger Dairies, Inc.*, 348 F.2d 189 (5th Cir. 1965), cert. den., 382 U.S. 977 (1966), as authority for its

contentions that defendant was engaged in an unlawful attempt to monopolize. That case involved the following facts. Appellant had about 2,500 dairy-producer members who supplied about 85% or 90% of the raw milk marketed in the Dallas-Fort Worth area. Appellee owned and operated a large milk plant in Dallas, and prior to September, 1958, purchased 75% or more of its raw milk from appellant, and the remainder from individual dairy farmers.

Appellee also owned surplus milk plants and refrigerated tank trucks. It notified appellant that its price for raw milk would be 30 cents per hundred pounds higher than the price announced by the Federal Market Administrator. This notice was received on August 29, 1958. Appellee refused to pay the increased price at first, but subsequently did so for a period of two weeks. During the latter part of September 1958, appellant demanded that appellee receive all of its milk in appellant's vehicles except for one load, and that it agree not to take on any additional producer's milk. Appellee refused these conditions, whereupon appellant attempted to stop its alternate sources of supply, and also made an unsuccessful attempt to purchase appellee. Appellant also boycotted appellee's milk products.

Comparing *North Texas Producers Association v. Metzger Dairies, supra,* with the instant case, insofar as defendant's relations with handlers are concerned, we note the following differences. In *North Texas,* appellant supplied 85% to 90% of the fluid milk in the relevant milk areas, whereas here defendant supplies approximately 50% in the relevant submarket. Also, differentiating the two cases is the effort to purchase appellee by appellant and the boycott of grocers handling appellee's milk.

North Texas, supra, is analogous to the case at bar in several aspects in that both defendant and appellant, in that case, insisted on a premium price and both insisted on no additional producer's milk being taken on without approval.

In *Bergjans Farm Diary Company v. Sanitary Milk Producers, supra,* a suit involving alleged violations of Sections 1

and 2 of the Sherman Act and Section 3(a) of the Clayton Act, there was proof that the diary producers cooperative conspired with retail stores to fix resale prices of milk, cut prices by deception as well as by payment of rebates to various stores, and also proof that the defendant purchased two large processing plants without putting up security, thereby putting defendant in the position of being a competitor with and a supplier to milk producers in St. Louis and St. Louis County.

Bergjans, supra, differs from the case at bar, in light of the evidence showing the secret rebates, the price cutting in one locality and the price increases in another, and the intent to drive out competition by bullying methods and by unlawful price discrimination. Its only similarity to the case at bar is the attempt made by the defendant to require its handlers to enter into full-supply agreements.

In *Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.* 497 F.2d 203 (9th Cir. 1974), p. 216, footnotes 10 and 11, the court states "(t)he best discussion we have been able to find on the Clayton and the Capper-Volstead Acts was a panel discussion of the Administrative Law Section of the American Bar Association at the 1969 annual meeting of the Section in Dallas, Texas." That discussion is summarized in the footnotes. With reference to predatory trade practices, it points out that in *Maryland and Virginia Milk Producers Association, Inc. v. United States*, 362 U.S. 458 (1960), the following conduct was held to be predatory:

1. Interference with shipment of nonmembers' milk;
2. Inducing a dairy to switch its marketing outlets from the area of direct competition with the cooperative;
3. The boycotting of a business to compel it to deal with the cooperative;
4. The use of economic power through loans to compel dealings with the cooperative;
5. The purchase of its competition at an exorbitant price to eliminate competition.

The footnotes then go on to discuss *Bergjans, supra,* and *North Texas, supra,* and state that in *Bergjans* there was discussed attempts by the cooperative to compel its customers to deal on an exclusive basis with it, but as is further pointed out in *Bergjans* illegal rebates, manipulation, conspiracy with retail outlets to fix retail prices, and an express intent to use unlawful means to control the market, were all involved, as well as perjury on the part of the officers of the cooperative.

Again, in its summary of *North Texas, supra,* the footnotes point out that the cooperative compelled customers to deal exclusively with it, and also point out the imposition of trying conditions involving the use of trucking, and the institution of a boycott to accomplish market control. The footnotes also state that a cooperative may obtain a complete monopoly of the product involved, and may make the necessary contracts to carry out the legitimate object of the producers and their associations unless predatory trade practices are engaged in.

In *Maryland and Virginia, supra,* the court said that cooperatives "could not 'restrain trade' or 'achieve monopoly by preying on independent producers, processors or dealers intent on carrying on their own businesses in their own legitimate way!" We do not believe that the conduct of the defendant in entering into the full-supply and committed-supply contracts rises to the level of predatory trade practices. In so finding, we observe that the "grandfather clause" preserved the rights of the existing producers to continue to deal with the handlers. We also observe that, in many instances, the handlers were members of large national concerns with assets greatly in excess of those of the defendant, and that in many instances, these handlers had available other sources of supply to which they could readily turn, and, further, that in many instances, bargaining continued for some time over a rather protracted length of time, and that in several instances, the handlers turned to completely different sources of supply than that provided by the defendant.

The United States contends that the acquisition by D.I. of 18 processing plants during the five-year period 1971-76, although

not unlawful in itself, is evidence of an attempt to monopolize and is, therefore, unlawful. Considerable reliance is had upon *Maryland and Virginia Milk Producers Association, Inc. v. United States, supra.* In that case, the milk producers supplied about 86% of the milk purchased by all milk dealers in the Washington metropolitan area. The Association purchased Embassy Dairy at a price far in excess of its actual value, because Embassy had, for a long time, engaged in price cutting and generally "'disruptive' competitive practices", that made the Association "unhappy". See*Maryland and Virginia Milk Producers Association, Inc. v. United States, supra,* at p. 470.

The court held that this was not a purchase made merely to advance the Association's own permissible processing and marketing business, but was a weapon to restrain and suppress competitors in the Washington area. The court stated that the privilege the Capper-Volstead Act granted to producers to conduct their affairs competitively did not include a privilege to combine with competitors so as to use a monopoly position as a further lever to suppress competition among independent producers and processors.

In the instant case, we do not find any purchase by defendant of any processing plans at prices in excess of their true value, nor do we find that the acquisitions made by D.I. were made to restrain and suppress competitors and competition in the southeastern area of the United States, inasmuch as the acquisitions seem to have been made at a leisurely rate and with the view in mind of furnishing to D.I. members a guaranteed outlet for their products.

Coming now to the claims of the United States about hauling contracts entered into by the defendant and various haulers of milk located in Indiana and in the Nashville, Tennessee area, we find that these agreements obligated the hauler to haul exclusively milk produced by members of D.I., and also imposed upon the hauler in one of these situations the duty of loyalty to D.I. Considerable evidence was introduced concerning the operation under such contracts, and the Court

finds that despite the existence of the contracts which were for periods of one year, each of the haulers did, in fact, accept milk from non-D.I. producers, and in one case, transported the milk of a Mr. Carr, who had a large dairy farm, from Tennessee to Alabama.

There was testimony to the effect that in the Nashville area defendant had entered into the exclusive hauling contracts, so that non-members of D.I. would be effectively precluded from delivering their dairy products to Sealtest-Nashville.

The Court finds that, although such exclusive hauling contracts made it more difficult for non-D.I. producers to deliver their milk in both Southern Indiana and in Nashville, that there existed alternative sources of delivery, either in the form of disloyal haulers or services provided by either handlers of milk or independent haulers.

The Court further finds that a rational ground existed for D.I.'s requiring an exclusive contract, in that if nonmembers' milk was accepted for hauling and then found to be defective by the handlers as Grade A milk, then all of the milk delivered by the hauler in that particular truck would have to be diverted to a lower grade purpose and receive a lower revenue, even though the great bulk of the milk was furnished by D.I. members and was acceptable to them. It should be mentioned in this connection that it was the duty of the haulers employed by D.I. to make a bacteria count of the milk delivered to them by the dairy farmers as well as to make an accurate report of the weight of the milk supplied.

It is pointed out by the United States that defendant has many nonexclusive contracts with haulers and that this has apparently not affected the quality of D.I.'s operations, or the quality of the milk delivered by the hauler to the handlers. The Court holds that it is not illegal for D.I. to enter into exclusive contracts for the hauling of its members' milk, so long as it does not foreclose its contract haulers from the option of hauling nonmembers' milk in trucks separately and apart from those in which it hauls the milk of D.I. members. This would overcome

the objection of D.I. to the possibility of co-mingling defective milk of nonmembers with high-quality milk of members, and at the same time would afford to nonmembers, where an operator has more than one truck, a meaningful method of delivery of their dairy products.

With respect to the membershp contracts, the evidence shows that apparently the top management of defendant contemplated that they would be for a period of two-years renewable, subject to termination by written notice given not more than 45 days prior to their anniversary and not less than 30 days prior to that date. However, there was much confusion among division management of the defendant, many of whom believed that the contracts were for a period of one year, and as a result, various litigation was instituted to prevent members from terminating their membershp at the end of one year. A uniform procedure was not achieved inasmuch as top management allowed local management much autonomy and did not require that the two-year provision be enforced.

The court finds nothing unreasonable in requiring the members of a cooperative to remain as members for a period of two years. In fact, many of the predecessor-cooperatives of defendant had insisted on a two-year contract, and in the absence of any persuasive authority cited by the United States, such an agreement would not constitute a violation of the applicable Acts.

Finally, and out of sequence, we come to the question of whether or not the pooling procedures followed by the defendant in 1971 with regard to milk pooled in Alma, Wisconson on the Nashville order area and milk pooled in Georgia on Mississippi constitute predatory practices. The evidence with respect to the Alma, Wisconsin on Nashville furnished by the plaintiff is not at all persuasive that any improper conduct by the defendant took place. As the economist for the Government, Dr. Masson, frankly states, it would have been very difficult for the defendant to have predicted what effect this pooling arrangement would have had on its members prior to

the time that it entered into the pooling. Further, Dr. Masson admitted that the pooling of the Alma plant was profitable until June 15, 1971 when it was suspended by the Department of Agriculture.

The testimony as to the pooling of milk on Mississippi by defendant is much more suspect. There was proof that defendant was concerned because the number of independent producers in Mississippi was increasing and defendant's membership was decreasing, and the independent producers were receiving a greater net price for their sales of Grade A milk than the members of defendant were receiving. Dr. Masson was of the opinion that in pooling milk from various other federal order areas, and particularly Georgia or Mississippi, defendant's members sustained a loss which amounted to approximately 1 cent per hundred weight in order to cause a loss of approximately 40 cents per hundred weight to nonmember producers.

Dr. Masson also relied upon the fact that American Milk Producers Institute, hereinafter AMPI, pooled milk on Mississippi from Arkansas and that this pooling was done by agreement between AMPI and defendant in order to drive the blend price down and thereby increase the membership in the two organizations. This testimony was based upon a statement made by J.W. Maxey, the Mississippi Manager of defendant, to the effect that AMPI and D.I. were coordinating their pooling operations in Mississippi.

Defendant counters by stating that it had estimated prior to its pooling operations in Mississippi that the pooling would be profitable to its members. It also argues that the figures which Dr. Masson used were based on erroneous computations made by defendant's own accountant.

Taking into consideration the fact that the blend prices received by Mississippi producers dropped from $6.81 per hundred weight in the month of January, 1971 to $5.98 per hundred weight in the month of May, 1971, and the fact that the percentage of Grade A milk utilized in Mississippi during the months in

question, as a percent of all producer milk, fell from 78% in January, 1971 to 47% in May, 1971, and also that the original figures supplied by defendant formed a substantial basis from which Dr. Masson could properly conclude that defendant suffered an economic loss of aproximately $126,000, and also that defendant was, in the words of its own witness, coordinating activities with AMPI, and that AMPI pooled 9,000,000 pounds of milk on the Mississippi order during the three-month period, and inasmuch as defendant was unhappy about the defection of some of its members in Mississippi and had discussed ways of alleviating this problem, and had, in fact, removed its price premium, the Court finds that the pooling practices in Mississippi during the months in question were carried out with a predatory intent to coerce nonmembers of defendant into becoming members. See *Marketing Assistance Plan, Inc. v. Associated Milk Producers, Inc.*, 338 F. Supp. 1019 (S.D. Tex. 1972).

Since the marketing administrator suspended the regulations which enabled defendant to carry out these predatory practices in May, 1971, and since there is no proof that defendant has engaged in this type of conduct since 1971, we will defer the entry of any injunctive-type of relief at this time pending suggestions from the parties as to what relief, if any, might be appropriate.

In reaching the decision that, with the exception of the pooling practices in Mississippi, defendant did not violate the provisions of Section 1 and 2 of the Sherman and Section 3 of the Clayton Act, we have not overlooked statements made by officials of defendant which would indicate that defendant was unhappy with the competition which it faced from various cooperatives such as N.F.O. and Gulf Coast Producers, as well as with the presence of independent producers who received certain benefits by virtue of defendant's advertising, negotiations with handlers, representation in Federal Milk Market Order hearings, and the handling of surplus fluid milk over weekends and holidays. We realize also that the conduct of defendant, which resulted in its procuring the full-supply and

committed-supply contracts from the processors, potentially could have had a very substantial adverse affect on other cooperatives and independent producers. However, the statistics presented at trial reveal that defendant has not enlarged substantially its position in the relevant market in terms of sales of Grade A milk or production of Grade A milk. See Exhibits DX-4, DX-16; GX-5, GX-6, and GX-7.

We have this day entered a judgment in accordance with these findings of fact and conclusions of law.

April 5, 1978

Charles M. Allen
United States District Judge

cc: Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action
No. 7634-A

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAIRYMEN, INC.,

Defendant.

SUPPLEMENTAL JUDGMENT

The United States, having moved to supplement the judgment entered on April 5, 1978, and the Court, being fully advised in the premises,

IT IS ORDERED AND ADJUDGED as follows:

1. Complaint of the plaintiff is dismissed with prejudice except for those portions which relate to the pooling practices of the defendant during the year 1971, with relation to Mississippi and those portions which relate to contracts entered into with the milk haulers in Tennessee and Indiana.

2. That the pooling activities engaged in by the defendant in Mississippi by pooling on Mississippi milk from the Georgia, Louisville, Lexington, Nashville, and Chattanooga Federal Order areas be and they are hereby declared illegal predatory practices in violation of Sections 1 and 2 of the Sherman Act.

3. That no injunctive relief be entered as to said practices, since they were discontinued some seven years ago, *and there is no probability that they will recur.*

IT IS FURTHER ORDERED AND ADJUGED that as to the contracts entered into by and between defendant and milk haulers in Tennessee and Indiana, *said contracts are in violation of Sections 1 and 2 of the Sherman Act, insofar as they prohibit a hauler who has more than one truck capable of hauling dairy products from hauling dairy products produced by producers who are nonmembers of defendant.*

This is not a final and appealable judgment.

Dated 6-21-78

Charles H. Allen
United States District Judge

cc: Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action
No. 7634-A

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAIRYMEN, INC.,

Defendant.

MEMORANDUM OPINION

The plaintiff has proposed a supplemental judgment following the entry by the Court of its judgment on April 5, 1978. The defendant has objected to the proposed supplemental judgment, and the matter has been extensively briefed.

The judgment of April 5th declared that the pooling activities engaged in by the defendant in Mississippi by pooling on Mississippi milk in various Order areas were illegal predatory practices in violation of Sections 1 and 2 of the Sherman Act. These practices have long ceased. They were discontinued because the United States Secretary of Agriculture suspended on June 15, 1971 certain Federal Order provisions which make it no longer economically feasible for a cooperative to benefit from pooling additional milk on the Mississippi pool.

To justify injunctive relief, the moving party must prove that a "cognizable danger of recurrent violation" exists. See *United States v. W. T. Grant Company*, 345 U.S. 629, at 633 (1953). The Court is of the opinion that the plaintiff has failed to prove that the continued practices will recur and, therefore, it sees *no necessity for granting any injunctive relief to plaintiff.*

With respect to the hauling contracts entered into by the defendant in Tennessee and Indiana, the Court pointed out in its findings of fact and conclusions of law that it was not illegal for D.I. to enter into exclusive contracts for the hauling of its members' milk so long as it did not foreclose its contract haulers from the option of hauling nonmembers' milk in trucks separate and apart from the milk of D.I. members. Despite this finding, the Court, in its judgment of April 5, 1978, dismissed that portion of the plaintiff's complaint which related to these products. This was not in conformity with the findings of fact and conclusions of law, and plaintiff is entitled to a judgment which is in harmony with the findings recited above.

The Court is not advised as to *whether defendant is still entering into these types of exclusive hauling contracts with haulers in Tennessee and Indiana, and, therefore, reserves its entry of a final judgment until the parties advise the Court as to their contentions in this respect.*

A nonfinal judgment in accordance with this opinion has been entered this day.

Dated 6-21-78

Charles H. Allen
United States District Judge

cc: Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action
No. 7634-A

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAIRYMEN, INC.,

Defendants.

MEMORANDUM OPINION

This action is submitted to the Court on the motion of the United States to enter a supplemental final judgment following the Court's entry of its original judgment on April 5, 1978 and its supplemental judgment on June 21, 1978.

The supplemental final judgment tendered by the Government and objected to by defendants, who have also tendered a proposed supplemental judgment, relates to the contracts which defendants had with milk haulers in Tennessee and Indiana, and which the Court has previously held violated Sections 1 and 2 of the Sherman Act, because they foreclosed the milk haulers from the option of hauling milk of nonmembers of Dairymen, Inc. in trucks separately and apart from the milk of D.I. members.

The original findings of fact and conclusions of law of the court noted it was "not illegal for D.I. to enter into exclusive

contracts for the hauling of its members' milk, so long as it does not foreclose its contract haulers from the option of hauling nonmembers' milk in trucks separately and apart from those in which it hauls the milk of D.I. members." It was noted that "(t)his would overcome the objection of D.I. to the possibility of co-mingling defective milk of nonmembers with high-quality milk of members, and at the same time would afford to nonmembers, where an operator has more than one truck, a meaningful method of delivery of their dairy products." See p. 23.

While this language literally restricted the hauler to the right to haul nonmembers' milk only if he had more than one truck, it is now the Court's opinion that such language is overly restrictive and that the true thrust of the Court's previous opinion was that the only legal restriction which the defendants could impose upon the hauler was to prevent him from co-mingling nonmembers' milk with members' milk. Therefore, the Court is now of the opinion that no contract between D.I. and a hauler may legally foreclose the hauler's right to haul nonmembers' milk, unless that right can be exercised only by co-mingling the milk with D.I. members' milk.

Finally, with reference to the controls suggested by the United States to implement the judgment, the Court believes that somewhat less restrictive measures are required. Specifically Paragraph VI(B) is amended to provide for a period of five (5) years rather than ten (10) years. Paragraph VII(B) is amended to provide for a period of two (2) years rather than four (4) years.

The Court has this day entered its supplemental final judgment in accordance with this opinion.

Dated 10-20-78

Charles M. Allen
United States District Judge

cc: Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY

Civ. No. 7634-A

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAIRYMEN, INC.,

Defendant.

SUPPLEMENTAL FINAL JUDGMENT

Plaintiff, the United States of America, having filed its complaint herein on March 29, 1973, and the Court after a full trial and consideraton of the evidence and briefs, and findings of fact and conclusions of law submitted by the parties, and the Court having filed its Findings of Fact and Conclusions of Law, Memorandum Opinion and Judgment, on April 5, 1978, and its Supplemental Judgment on June 21, 1978, and having heard the parties with respect to the issue of relief, it is hereby further

ORDERED, ADJUDGED AND DECREED as follows:

I.

This Court has jurisdiction of the subject matter hereof and of the parties hereto.

II.

The complaint of the plaintiff is dismissed with prejudice except for those portions which relate to the pooling practices

of the defendant during the year 1971, with relation to Mississippi and those portions which relate to contracts entered into with milk haulers.

(A) The pooling activities engaged in by the defendant in Mississippi by pooling on Mississippi milk from the Georgia, Louisville, Lexington, Nashville, and Chattanooga Federal Order areas be and they are hereby declared illegal predatory practices in violation of Sections 1 and 2 of the Sherman Act.

No injunctive relief shall be entered as to said practices, since they were discontinued some seven years ago, and there is no probability that they will recur.

(B) As to the contracts entered into by and between defendant and milk haulers, said contractors are in violation of Sections 1 and 2 of the Sherman Act, insofar as they prohibit a hauler from hauling milk produced by nonmembers producers when such milk is not commingled with the milk of members of defendant.

Injunctive relief as to this conduct shall be entered as specified in parts III through IX of this Supplemental Final Judgment.

III.

As used in this Final Judgment

(A) "Milk hauler" means a person who is not an employee of defendant who owns or operates a truck and transports milk;

(B) "Producer" means any person engaged in the production of milk including but no limited to members.

(C) "Member" means a producer who has a membership and marketing agreement with defendant and whose milk production is marketed by defendant;

(D) "Milk" means raw Grade A milk;

(E) "Person" means any corporation, partnership, association, individual, cooperative, or other business or legal entity;

IV.

The provisions of this Final Judgment shall apply to Dairymen, Inc., its officers, directors, agents and employees, to its subsidiaries, successors and assigns and to their respective officers, directors, agents and employees, and to all persons in active concert or participation with any of them who receive actual notice of the Final Judgment by personal service or otherwise.

V.

Defendant is hereby enjoined and restrained from:

(A) Entering into or enforcing any contract, agreement or understanding with any milk hauler that requires the milk hauler to transport milk exclusively for defendant or its members, or obtain the consent of defendant in order to haul the milk of producers who are not members of defendant; but defendant may require that a milk hauler not commingle member producer milk with nonmember producer milk.

(B) Using threats or coercion to induce any milk hauler to execute or refrain from terminating a hauling agreement with defendant which would violate provision V(A) above.

(C) Using threats or coercion to induce any milk hauler to cease hauling milk for nonmember producers, or to haul milk for member producers, or to not compete against defendant in providing milk hauling services to producers.

(D) Coercing or inducing any producer to deliver milk to defendant or to refrain from terminating a membership and marketing agreement with defendant by making threats or statements which express or imply that defendant is considering action or will take action to prevent, restrict or otherwise deleteriously affect the availability of any milk hauler's services to any producer.

VI.

(A) Defendant is enjoined and restrained from adopting, adhering to, enforcing, or claiming any rights under any by-

law, rule or regulation which is contrary to or inconsistent with any of the provisions of this Final Judgment.

(B) Defendant is ordered to file with plaintiff annually for a period of five (5) years, on or before June 30, a report setting forth the steps taken by its board of directors to advise its officers, directors, employees, members and all appropriate committees of its and their obligations under this Final Judgment.

VII.

(A) Defendant is ordered to mail or otherwise furnish within ninety (90) days after the entry of this Final Judgment a copy thereof to each of its members and employees, to each milk hauler transporting milk for defendant, to each person purchasing milk from or selling milk to defendant, and to any organization for which defendant acts as marketing agent, and within one hundred fifty (150) days from the aforesaid date of entry to file with the Clerk of the Court an affidavit setting forth the fact and manner of compliance with Paragraph VII.

(B) Defendant is further ordered and directed to publish, in a publication circulated to all its members, a copy of this Final Judgment once each year for two, (2) years on or about the anniversary date of entry of this Final Judgment, and to furnish a copy of this Final Judgment to any person upon request.

VIII.

(A) For the purpose of determining or securing compliance with this Final Judgment and for no other purpose, the Defendant shall permit duly authorized representatives of the Department of Justice, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendant at its principal office, subject to any legally recognized privilege:

(1) Access, during the regular business hours of Defendant, who may have counsel present, to inspect and copy all books, ledgers, accounts, correspondence, memoranda

and other records and documents in the possession or under the control of the Defendant which relate to any matters contained in this Final Judgment;

(2) Subject to the reasonable convenience of the Defendant, and without restraint or interference from it, to interview any officers or employees of Defendant, who may have counsel present, regarding any matters contained in this Final Judgment.

(B) For the purpose of determining or securing, compliance with this Final Judgment and for no other purpose, the Defendant shall submit such reports in writing, under oath if so requested, with respect to any matters contained in this Final Judgment as may from time to time be requested in writing by the Attorney General or the Assistant Attorney General in Charge of the Antitrust Division.

(C) No information obtained by the means provided in this Part VIII shall be divulged by a representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or otherwise required by law.

(D) If at any time information or documents are furnished by Defendant to Plaintiff, and Defendant represents and identifies in writing that the material in any such information or documents is of a type described in Rule 26(c)(7) of the Federal Rules of Civil Procedure and said Defendant marks each pertinent page of such material, "Subject to claim of protection under rule 26(c)(7) of the Federal Rules of Civil Procedures," then 10 days notice shall be given by Plaintiff to Defendant prior to divulging such material in any legal proceeding (other than a Grand Jury proceeding) to which the Defendant is not a party.

IX.

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to

this Court at any time for such further orders and directions as may be necessary or appropriate for the construction of or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith and for the punishment of violations hereof.

X.

This is a final and appealable judgment and there is no just cause for delay.

Dated 10-20-78

Charles M. Allen
United States District Judge

cc: Counsel of Record

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE**

**Civil Action
No. 7634-A**

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAIRYMEN, INC.,

Defendant.

**ORDER AMENDING FINDINGS OF FACT
CONCLUSIONS OF LAW AND MEMORANDUM OPINION**

Defendant, Dairymen, Inc., having moved to amend the findings of fact, conclusions of law and memorandum opinion entered on April 5, 1978, hereinafter referred to as the April 5, 1978, and the Court, having considered the briefs of the parties and the objections of the United States,

IT IS ORDERED that the April 5 opinion be amended as underscored below:

1. Paragraph 6 of page 2 of the April 5 opinion is amended as follows:

> The States of Alabama, North Carolina, South Carolina, Virginia, Louisiana *and, until mid-1970, Mississippi* regulated the sale of Grade A milk by State regulations, and the balance of the territories where D.I. facilities and members were located were regulated, with the exception of 2% of the territory, by Federal Milk Marketing Orders.

2. The second sentence of paragraph 4 of page 3 of the April 5 opinion is amended as follows:

> Only Grade A milk is regulated under the Federal *Milk Marketing Orders* or State Milk Marketing Commissions . . .

3. The first sentence of paragraph 3 of page 4 of the April 5 opinion is amended as follows:

> The price which Grade A milk received in Federal Order *areas* is based upon what is known as the "Minnesota-Wisconsin pricing formula" which involves the price paid by 100 dairy manufacturing plants in Minnesota and Wisconsin for non-Grade A milk, to which amount is added fixed amounts by the Federal Regulatory Authorities . . .

4. The first incomplete paragraph of page 5 of the April 5 opinion (continued from page 4 of the April 5 opinion) is amended as follows:

> Missouri and West Virginia. In addition it is shown that the defendant markets its milk in these areas and also in the Tampa Bay area in Florida, and in certain parts of Maryland.

5. Paragraph 2 of page 6 of the April 5 opinion is amended as follows:

> Pertinent to these comments is the observation that the southeastern area states, during the late summer and autumn, do not produce enough Grade A milk to meet the demand in their areas, and that consequently Grade A milk is shipped from the surplus states of Wisconsin, Minnesota, Iowa and Missouri to the southeastern states, although this involves a cost of approximately 15 cents per hundredweight *per 100 miles* for transportation. Of course, the processors and handlers prefer to purchase their milk from nearby sources, but the great expansion of the interstate highway system, plus the construction of

efficient dairy tankers has made practical the movement of milk in commercial quantities from the midwestern states to the southeastern areas, as evidenced by the fact that the National Farmers Organization, hereinafter referred to as N.F.O., one of defendant's competitors, was able to quote a price for Grade A milk delivered from Wisconsin to Nashville which was *15 cents per hundredweight* less than the price quoted by the defendant for locally supplied milk.

6. The first two sentences of paragraph 2 of page 7 of the April 5 opinion are amended as follows:

> First, as to the relevant geographic market, the Court finds that it is made up of all the states in the southeast with the exception of Florida, and, in addition, comprises the southern portion of Indiana and Illinois, as well as a very small part of eastern Missouri *and West Virginia*. The area, therefore, is more specifically defined as being Virginia, Georgia, Alabama, North Carolina, South Carolina, Mississippi, Louisiana, Tennessee, Kentucky, Southern Indiana, Southern Illinois and Eastern Missouri *and West Virginia*.

7. The first sentence of paragraph 3 of page 10 of the April 5 opinion is amended as follows:

> In the case at bar, the question is quite close and is not as clear cut as that in *Brown*, *supra*. Exhibit GX—*930* prepared by the Farmer Cooperative Service of the United States Department of Agriculture tips the scale toward a finding that Grade A milk is the relevant product . . .

8. The first sentence of paragraph 3 of page 18 of the April 5 opinion is amended as follows:

> Comparing *North Texas Producers Association v. Metzger Dairies*, *supra*, with the instant case, insofar as defendant's relations with handlers are concerned, we note the following differences. In *North Texas*, appellant

supplied 85% to 90% of the fluid milk in the relevant *market* areas, whereas here defendant supplies approximately 50% in the relevant *geographic market*. . . .

9. Paragraph 2 of page 24 of the April 5 opinion is amended as follows:

Dr. Masson also relied upon the *fact* that *Associated Milk Producers, Inc.*, hereinafter AMPI, pooled milk on Mississippi from Arkansas, and *on his belief that* this pooling was done by agreement between AMPI and defendant in order to drive the blend price down and thereby increase the membership in the two organizations. *The belief of Dr. Masson* was based upon a statement made by J. W. Maxey, the Mississippi Manager of defendant, to the effect that AMPI and D.I. *had, on some occasions coordinated* their pooling operations in Mississippi.

10. The first sentence of paragraph 1 of page 25 of the April 5 opinion is amended as follows:

Taking into consideration the fact that the blend prices received by Mississippi producers dropped from $6,81 per hundred weight in the month of January, 1971 to $5.98 per hundred weight in the month of May, 1971, *because of inter alia, the complained of pooling practices*, and the fact that the percentage of Grade A milk utilized in Mississippi during the months in question, as a percent of all producer milk, fell from 78% in January. 1971 to 47% in May, 1971, *because of inter alia, the complained of pooling practices*, and also that the original figures supplied by defendant formed a substantial basis from which Dr. Masson could properly conclude that defendant suffered an economic loss of approximately $126,000, and also that defendant *had on some occasions*, in the words of its own witness, *coordinated* activities with AMPI, and that AMPI pooled 9,000,000 pounds of milk on the Mississippi order during the three-month period, and inasmuch as defendant was unhappy about the defection of some of its members in Mississippi and had discussed ways of al-

> leviating this problem and had, in fact, removed its price premium, the Court finds that the pooling practices in Mississippi during the months in question were carried out with a predatory intent to coerce nonmembers of defendant into becoming members.

It appearing to the Court that the sentence appearing on page 24 of its findings of fact, conclusions of law and memorandum opinion of April 5, 1978, which reads as follows:

> Further, Dr. Masson admitted that the pooling of the Alma Plant was profitable until June 15, 1971 when it was suspended by the Department of Agriculture.

is not accurate in that it appears from all of Dr. Masson's testimony that he was not clear as to what the effect of the pooling of the Alma Plant was, said sentence is deleted and there substituted for it the following sentence:

> Although Dr. Masson admitted that the pooling of the Alma Plant was profitable on page 2845 of the transcript, it appears that this evidence may have been a slip of the tongue, inasmuch as other testimony he gave indicated that he believed that the pooling of the Alma Plant was not profitable.

Dated 1-22-79

Charles M. Allen
United States District Judge

cc: Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action
No. C 7634 A

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAIRYMEN, INC.,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On April 5, 1978, this Court entered a judgment and on June 21, 1978 a supplemental judgment which dismissed that portion of the plaintiff's complaint which alleged that Dairymen, Inc., (D.I.) attempted to monopolize the market in Grade A milk in the Southeastern United States. Those judgments also held that D.I. had violated Section 3 of the Clayton Act by requiring its milk haulers to enter into exclusive hauling contracts. The judgments also dismissed that portion of the plaintiff's complaint which alleged that the full supply and committed supply contracts used by D.I. foreclosed a substantial share of the market from its competitors and tended to create a monopoly in violation of Section 3 of the Clayton Act.

On appeal, the United States Court of Appeals for the Sixth Circuit, in its per curiam opinion entitled *United States v. Dairymen, Inc.*, 660 F.2d 192 (1981) reversed that part of this Court's judgment which had dismissed the attempt-to-monopolize charge because of this Court's belief that the Government

had failed to prove that D.I.'s anticompetitive practices rose to the level of predatory trade practices, and because the United States failed to prove that there was a dangerous probability that a monopoly would result from D.I.'s practices. See p. 193.

The Court of Appeals affirmed that portion of this Court's decision which found that D.I.'s exclusive hauling contracts were overly restrictive, and also found that D.I.'s pooling practices in Mississippi were illegal. See pp. 193-194.

In its opinion, the Court of Appeals states that this Court erred when it held that the Capper-Volstead Act, 7 U.S.C. Secs. 291, 292 and Section 6 of the Clayton Act, 15 U.S.C. Sec. 17, exempted agricultural cooperatives from liability for attempts to monopolize unless their anticompetitive conduct was deemed predatory. See p. 194.

The appellate court's opinion goes on to hold that the burden on the Government is to show only that the defendant had engaged in anticompetitive conduct with a specific intent to monopolize, and that there was a dangerous probability that the attempt would be successful. See p. 194.

The Sixth Circuit went on to state that "(t)he district court did not determine whether D.I. used its full supply and committed supply contracts and exclusive hauling contracts with the specific intent to monopolize, and it is necessary to remand this case for that determination." See p. 195. The Sixth Circuit went on to state that ". . . the most important inquiry is whether these contracts were intended to stifle competition or were intended to meet legitimate business purposes."

In addition, the Court of Appeals directed this Court to ". . . determine the relevant geographic submarkets on the basis of commercially significant areas in which D.I. operated and in which D.I.'s customers could turn to other suppliers." (Citing *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)). As the Court of Appeals pointed out "(o)nce this factual determination is made it will be possible to evaluate whether

D.I. ever achieved a dangerous probability of success of monopoly in any significant market." See p. 195.

The Court then pointed out that "(a)fter the district court determines the relevant geographic submarkets it will be possible to determine whether the full and committed supply contracts used by D.I. foreclose a substantial share of the market from its competitors and 'tend(s) to create a monopoly in any line of commerce' in violation of Section 3 of the Clayton Act." (Footnote deleted) See p. 195. The Court of Appeals also stated on p. 195 that this Court "rejected the Government's proposed geographic submarkets because it believed this type of analysis was not required under Section 2 of the Sherman Act, unlike the inquiry made under Section 7 of the Clayton Act." The court then went on to state "(h)owever in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 173, 68 S.Ct. 915, 936–937, 92 L.Ed. 1260 (1948), the Supreme Court stated that Section 2 of the Sherman Act 'condemns monopoly of "any part" of trade of commerce. "Any part" is construed to mean an appreciable part of interstate or foreign trade or commerce. In addition, in *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242, 251, 79 S.Ct. 245, 251, 3 L.Ed. 2d 270 (1959) the Supreme Court specifically noted that the Sherman Act is applied to 'localized geographic area(s).'"

It is apparent from the decision of the Sixth Circuit that this Court should attempt to define a relevant geographic market along with relevant geographic submarkets, and that the test used under Sec. 3 of the Clayton Act by inference is deemed by the appellate court to be interchangeable with the test to be used in connection with Sec. 2 of the Sherman Act.

The United States contends that the relevant submarket is to be found in an area comprising the states of Kentucky, Tennessee, Georgia, Mississippi and Louisiana. The defendant contends, on the other hand, that the relevant geographic submarket contains not only the states proposed by the Government but the four milk commission states of Virginia, North and South Carolina and Alabama. The Government contends

that the milk commission states, by virtue of their regulations pertaining to the relations between producers and handlers, effectively reduced or effectively barred the producers in those states from competing in the areas which the Government contents constitutes the relevant geographic market. Those regulations provide, in substance, for close relationships between handlers and producers and fix certain percentages of their milk supplies which handlers must accept from producers once the parties have agreed to enter into commercial relationships. Those relationships and rgulations will be set out in detail in the appendix to this opinion.

Contrary to the Government's position, the testimony does reflect that handlers in the Government's proposed geographic submarket purchased milk from the producers in the four milk commission states. Also, it is true that handlers in the Southeastern territory purchased milk produced in Wisconsin, Minnesota, and other areas outside the Southeastern territory, and must, in fact, do so in times of peak demand and low supply. However, the Appellate Court has specifically directed this Court to use the broad test set out in *United States v. Paramount Pictures, Inc., supra,* and *International Boxing Club of New York, Inc. v. United States, supra.* This results in the Court, in essence, being authorized to find a relevant geographic submarket which may be considerably smaller in area than the relevant market as a whole. See *United States v. Empire Gas Corporation,* 537 F.2d 296 (8th Cir. 1976).

Using this approach and taking into consideration the fact that it is more expensive for handlers in the Southeastern states to purchase milk produced in such areas as Minnesota and Wisconsin, and therefore it is more practical to purchase milk produced in nearby areas, we believe that the relevant submarket should be considered as comprising the states of Kentucky, Tennessee, Georgia Mississippi, and Louisiana.

While the states of Virginia, North and South Carolina, and Alabama are contiguous to the five states which we believe constitute the relevant geographic submarket, and while there

is substantial evidence that a portion of the Grade A milk purchased in the relevant submarket comes from the contiguous states, *there are no hard statistics showing how much is so purchased.* Also, because of the presence of State Dairy Commissions which regulate the relationships between cooperatives and the processors in a different fashion than do the Federal Order areas, such differences in processors and regulations would it *seems inhibit, to some extent,* the availability of milk in those states for purchase by processors in the relevant submarket.

Also a consideration is the fact that all of the brush fire incidents concerning which the Government complains took place in the relevant submarket, and that the pooling practices complained of took place in Mississippi and that some of the hauling contracts took place in some of the relevant submarkets. In short, the five-state submarket appears to be the area where the Government has concentrated most of its evidence to show the attempt to monopolize and the alleged violation of Section 3 of the Clayton Act.

The Government contends that the proper measure of the relevant geographic submarket is milk pooled on that market, whereas D.I. claims that the relevant measure is the milk produced in that area. In this connection, the opinion of the Court of Appeals gives no clue as to what the current holding of this Court should be. In its original opinion, this Court found that the correct measure is the milk produced rather than amount pooled. Since the Appellate Court did not mention or refer to this measure in its opinion, the Court might be warranted in assuming that its original determination was correct. However, with no reference to this important question to guide the Court, the Court will, out of an abundance of caution reanalyze the arguments of the parties.

Simply stated, the Government contends that milk which is pooled is, in fact, milk which can be purchased by handlers in the territories where the milk is pooled. The subject of pooling is rather complex. As the Court understands it, in the states

which constitute the relevant geographic submarket as found by this Court, the Federal Marketing Orders regulate the plants of the milk handlers. Any milk handler who makes about 15% of his total fluid milk sales within the Federal Orders area becomes fully regulated by the Order. His plant then becomes what is known as a "Fully Regulated Pool Plant" or "Pool Distributing Plant," or under certain conditions "Pool Supply Plant." These handlers must pay to the producers the blend price as computed by the Government, and must account to what is known as the "Federal Order Pool" at class prices. The cooperatives and producers, in turn, may divert Grade A milk pursuant to the Federal Marketing Orders from a pool plant without that plant having physically received the milk, the diversion going to unregulated plants or other Federal Order Pool plants. This milk is treated as if it had actually been received in the pool plant, even though shipped to another plant, by shipping to an unregulated plant or pool plant regulated under another Order. That milk which is diverted qualifies as producer milk and remains pooled on that Federal Order regulating the plant from which diverted, and that milk is entitled to receive the Order plant price.

More specifically, it appears that 16.1% of the milk pooled on the Georgia Federal Order 7 was produced on farms located in Alabama, Tennessee and North and South Carolina. This was for the year 1973, whereas in 1971, some 36,461,000 lbs. of milk pooled on the Georgia Order was produced in the State of Virginia. This evidence and other evidence of pooling indicates that there is extensive pooling within the Southeastern territory. D.I. contends that the amount of milk pooled on a Federal Order is not an accurate reflection of the amount of milk actually delivered or sold to the regulated handlers located in the particular Federal Order area. The question then arises as to whether the amount of milk produced within a particular Federal Order area accurately reflects the amount of milk received by handlers from producers.

While it is apparent that handlers located in the relevant geographic submarket not only purchase milk produced in

their particular states but also purchase milk which is pooled on various Federal Orders, it would appear at first blush that the fair way to measure D.I.'s share of the submarket would be to establish the amount of milk produced in that submarket and then weigh the amount of milk pooled on the Federal Order located in that state and sold to handlers. However, the Government has been unable to furnish any statistics which would accurately establish what portions of handlers' milk purchases are made from milk which has been pooled on Federal Orders located in the particular states in which the milk handlers are located.

This being so, the Court must follow the reasoning adopted by the District Court in the case of *Alexander v. National Farmers Organization*, 687 F.2d 1173 (8th Cir. 1982), where that court held that plaintiff's "statistical evidence was not sufficiently well defined to support its claims of actual and attempted monopolization." See 1192. In that case the Appellate Court noted that the defendants had disputed the sufficiency of plaintiff's market definition and share data, arguing that it fails to account for milk which is pooled on one order but actually sold in another, or for certain unregulated milk supplies not reflected in the pooling statistics or for other milk movements between orders and across boundaries variously proposed as market definitions by plaintiff. See 1192.

We note that the Appellate Court held that this finding was not clearly erroneous and, therefore, did not decide the issue of whether the District Court would have been clearly erroneous had it accepted the market definition and share data presented to it by the plaintiff. However, we believe that our conclusion that the Government has produced insufficient evidence to allow this Court to find the amount of milk pooled, together with the amount of milk produced in the relevant geographic submarkets, is a logical finding.

Reviewing the statistics for the relevant geographic submarkets, which we note in passing is the market where defendant's market share is the greatest, we find that for the year 1971, D.I.'s share of the milk produced was as follows:

Kentucky	Tennessee	Georgia	Louisiana	Mississippi
57.6%	72.5%	65%	41.2%	61.3%

The average share of the market possessed by D.I. in 1971 was 60.1%. In the years since 1971, D.I.'s share of the milk produced in these states has declined as shown by the following table.

1972 - 57.9%;	1973 - 56.7%;	1974 - 54.2%;
1975 - 52.1%;	1976 - 53.5%;	1977 - 52.6%;
1978 - 51.8%;	1979 - 51.9%;	1980 - 49.0%;
1981 - 48.6%.		

An attempt to monopolize claim such as the Government makes here generally requires a specific intent to monopolize, and a showing of a dangerous probability of success, the latter of which is also examined by reference to the offender's share of the relevant market. See *Alexander v. National Farmers Organization, supra,* at 1181.

In determining whether or not the acts of D.I. reveal a specific intent to monopolize, the Court must consider the testimony as a whole and the brush fire incidents, not as separate compartmentalized incidents, but as part of the whole picture of defendant's dealings and allegedly anticompetitive practices. See *United States v. Dairymen, Inc., supra,* and *Alexander v. National Farmers Organization, supra.* Using this approach, the preponderance of proof as found in the original findings of fact and conclusions of law was to the effect that D.I. had resorted to anticompetitive pooling practices in Mississippi. There was also the finding that D.I. had resorted to illegal hauling contracts in Indiana, which is not a part of the relevant submarket, and in Tennessee, which is. When these exclusionary and anticompetitive practices are considered, in conjunction with the brush fire incidents, and D.I.'s insistence upon either committed or full-supply contracts, and where such insistence was accompanied by threats to cutoff the milk supplies of the processors and by statements of D.I. officials to the effect that it had been successful in foiling N.F.O.'s attempt to sell milk at competitive prices in Nashville and Atlanta, we

reach the conclusion that the Government has shown a specific intent to monopolize.

In reaching this conclusion, we are mindful of the fact that there was no proof of picketing, harrassment, boycotts, or discriminatory pricing. We are cognizant also of the fact that the conduct of D.I. in no way was as egregious as that of the defendants in *Otto Milk Company v. United Dairy Farmers Cooperative Association*, 388 F.2d 789 (3rd Cir. 1967) and *North Texas Producers Association v. Metzger Dairies, Inc.*, 348 F.2d 189 (5th Cir. 1965), cert. denied, 382 U.S. 977 (1966), or in *Alexander, supra.* In short, the evidence as to specific intent is rather closely balanced, but the Court finds that the balance tips slightly in favor of the United States.

Coming now to the question of whether or not the Government has proved that there was a dangerous probability of success, we note that the courts have often discussed the share of the market which must be possessed by a defendant before it can be found that the defendant possessed either a monopoly or a dangerous probability of success of establishing a monopoly. In the Supreme Court case of *Farmer's Guide Publishing Company v. Prairie Farmer Publishing Company*, 293 U.S. 268 (1934), the court held that it was error for the district court to direct a verdict for the respondents under Sections 1 and 2 of the Sherman Act, where the proof established that the respondent's share of the market during a five-year period ranged from 44.7% to 66.93%.

In *Bergjans Farm Dairy Company v. Sanitary Milk Producers*, 241 F.Supp. 476 (E.D. Mo. 1965), aff'd 368 F.2d 679 (8th Cir. 1966), it was held that a 55% share of the relevant geographic submarket constitutes sufficient evidence to allow the case to be submitted to the jury in conjunction with much other evidence revealing coercive and predatory conduct by the defendant.

On the other hand, it has been held that where a defendant has a share of the market which is declining over the years, that this is to be considered as evidence demonstrating the im-

probability of success of an intent to monopolize. See *Lektro-Vend Corporation v. Vendo Company*, 660 F.2d 255 (7th Cir. 1981), cert. denied, 455 U.S. 921 (1982).

Applying these rather elastic principles to the case at bar, we note that D.I.'s share of the relevant geographic submarket was 60% in 1971 and that it decreased the years immediately following 1971 until 1975 when it was 52.1%.

In the case of *Broadway Delivery Corporation v. United Parcel Service of America*, 651 F.2d 122 (2nd Cir. 1981), at pp. 126-29, the court points out that market share evidence is significant as an indicator of either the presence or absence of monopoly power, but that its true significance can only be determined after careful analysis of the particular market, and that sometimes it may be useful to suggest that a market share below 50% is rarely evidence of monopoly power, a share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power. See p. 129.

In short, there is no *per se* rule which holds that a certain percentage of the relevant market dictates a finding of monopoly power or a lack thereof.

The courts have had great difficulty in articulating the criteria by which a dangerous probability of success is to be measured. In *United States v. Empire Gas Corporation*, 537 F.2d 296 (8th Cir. 1976), the court, in discussing the dangerous probability of success requirement, held that there was no such probability, assuming that the defendant had about 50% of the market in dollar sales in one area and 47% in another, where there was insufficient proof that competitors of the defendant raised or fixed prices because of defendant's threats; stopped soliciting the defendant's customers; or decided not to enter the LP business; or decided to leave the business on account of defendant's actions. See p. 305.

Analysis of the *Empire Gas*, *supra*, case tends to show that the court was basically concerned with whether or not there

was a dangerous probability that the defendant could control prices in the relevant markets. Also, the court was concerned with whether or not the defendant had the power to effectively exclude competitors from the market.

Applying these principles to the proof in the case at bar, the evidence does not show conclusively that D.I. was able to make its competitors raise or fix prices. In fact the proof reveals that N.F.O. was selling at prices lower than D.I. and continued to do so.

With reference to the power to exclude competitors from the relevant market, the weight of evidence is to the effect that, although D.I. was successful in obtaining committed and full-supply contracts from handlers whose purchases approximated almost 50% of the sales made to handlers in the relevant submarkets, D.I. still lacked the power to exclude N.F.O. from competing in the relevant submarkets. This is reflected by the evidence that Sealtest-Chattanooga received all of its supplies from N.F.O. after defendant withheld its supply from its plant.

The power of D.I. to control prices and exclude competitors was also limited by the fact that many of the processors were strong national concerns with assets in excess of those possessed by D.I. Such processors were not easily intimidated by D.I.'s actions as related in the Court's discussion of the brush fire incidents in its previous opinion.

On balance, we reach the conclusion that the Government has failed by a narrow margin to meet its burden of proof with reference to the probability of success factor. Had the processors and handlers been less powerful in their own right, the conclusion of the Court might have been different, but their power, plus the undisputed proof that D.I.'s share of the market declined after 1971, plus the other criteria which we have discussed, would seem to justify the holding that the United States has failed to prove a violation of the attempt to monopolize provisions of Section 2 of the Sherman Act.

We come now to the question of whether or not the Government has proved a violation of Section 3 of the Clayton Act, 15 U.S.C. Sec. 14. That section provides as follows:

Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

In a scholarly opinion in the case of White *and White v. American Hospital Supply*, 540 F.Supp. 951 (W.D. Mich. 1982), at pp. 1026-30, District Judge Hillman discusses in some detail the meaning of Section 3 of the Clayton Act. As he points out, it promotes competitive distribution of products and condemns anticompetitive exclusive dealing arrangements and requirements contracts. As he further points out requirement contracts are not *per se* illegal and must, therefore, be tested under a Rule of Reason analysis. See p. 1027. He then goes on to point out that the effect of an exclusive dealing arrangement (in this case a requirements contract) may be measured through either of two approaches: a quantitative or a qualitative approach. See *Standard Oil Company Stations v. United States*, 337 U.S. 293 (1949) (hereinafter *Standard Stations).*

The Supreme Court measured the anticompetitive dealing arrangements of Standard Oil by reference to the percentage of the market foreclosed by the requirements contract, and the

Supreme Court held that a foreclosure of 6.7% of the market was sufficient to warrant a finding that Standard Oil had violated Section 3 of the Clayton Act. That approach has been widely criticized. See *Lockhart and Sacks*, "The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act," 65 Harv. L. Rev. 913 (1952); *Schwartz*, "Potential Impairment of Competition; The Impact of *Standard Oil of California v. United States* on the Standard of Legality Under the Clayton Act," 98 U.Pa L.Rev. 10 (1949). See 540 F.Supp. at 1028.

Notwithstanding that criticism, the quantitative approach was applied in the case of *Mytinger and Casselberry, Inc. v. FTC*, 301 F.2d 534 (D. C. Cir. 1963).

In *Tampa Electric Company v. Nashville Coal Company*, 365 U.S. 320 (1961), the Supreme Court, after holding that the line of commerce and area of effective competition must be carefully selected, stated that ". . . the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market." See p. 328. The Court noted at pp. 328-29 that in *Standard Stations supra*, there are 5,937 gasoline stations involved which constituted 16% of the retail outlets in the relevant market which were covered by over 8,000 contracts, together with a great volume of products involved. The Court then went on to note that in *Standard Stations*, the ". . . affected proportion of retail sales was substantial." See p. 329. It then went on to distinguish *Standard Stations*, from *United States v. Columbia Steel Company*, 334 U.S. 495 (1948), where the Court found that there was no violation where the seller's share of the only relevant market was 3%.

In *Tampa Electric, supra*, the Court points out that to determine substantiality in a given case, "it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relevant strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the

relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein." See p. 329. The Court also stated that ". . . a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence."

In the latter part of *Tampa Electric,* the Supreme Court points out that requirements contracts may be of economic advantage to buyers as well as sellers, and that there was no seller with a dominate position in the market or myriad outlets with substantial sales volume, coupled with an industry-wide practice of relying upon exclusive contracts as in *Standard Stations, supra,* or a plainly restrictive typing arrangement as in *International Salt Company v. United States,* 332 U.S. 392 (1947). See p. 334.

It is obvious from the recitation of the principles set out in *Tampa Electric* and *Standard Stations,* that the facts in the case at bar are not closely analogous to those cases, since in *Tampa Electric* their electric contracts were less than 1% of the total market production of 700 coal producers who could effective compete in the relevant market. In the case at bar, D.I. by contrast had a market share in the relevant submarket of more than 50%, and was, therefore, very much nearer to dominance than was Nashville Coal Company in *Tampa Electric, supra.* In fact, D.I.'s share of the relevant submarket during the period in question in this action is greatly in excess of the relevant market share of Standard Oil in *Standard Stations, supra.*

In the case of *American Motor Inns, Inc. v. Holiday Inns, Inc.,* 521 F.2d 1230 (3rd Cir. 1975), the court held that if the non-Holiday Inn clause entered into between Holiday Inn and its franchisees foreclose competitors of Holiday Inns from 14.7% of the market, that clause might well offend the limitations which the Clayton Act places on exclusive contracts. The Appellate Court, however, made it clear that in deciding whether an exclusive dealing contract violates Section 3 of the

Clayton Act, the judiciary must take into account the economic justification for the arrangements, citing *Tampa Electric Company v. Nashville Coal Company, supra.* See 521 F.2d at p. 1251.

Also, *Holiday Inns, supra,* makes it clear the trial could should consider "'the probable immediate and future effects which preemption of that share of the market might have' within the competitive context of that industry," and also must consider the relative strength of the parties. See p. 1252.

As noted previously, there are sound business reasons for the execution of committed and full supply contracts on one year's duration. In fact the Government has consented to such provisions in the case of *United States v. Associated Milk Producers,* 394 F.Supp. 29 (W.D. Mo. 1975).

As we have previously noted, the processors and dealers with whom D.I. often dealt were of equal or greater economic strength than D.I. Also, because of the cyclical nature of the milk market, there are sound business reasons for entering into full-supply contracts which cover a period of a year. Even though there are sound and legitimate reasons for entering into full-supply or committed supply contracts, and even though those contracts contain grandfather clauses, the fact remains that they were contracts which D.I. obtained at a time when it possessed 59.5% of the relevant submarket and the contracts themselves controlled the purchase of almost 50% of the Grade A milk marketed in the relevant submarkets. We believe that the timing of the execution of these contracts, occurring as they did when D.I. was at the peak of its market share power, renders them in violation of Section 3 of the Clayton Act, even though that would not have been had D.I.'s share of the relevant submarket been significantly less.

We note that *Tampa Electric, supra,* calls for an evaluation of the relative strength of the competitors of D.I. as well as its consumers. Competitors of D.I. consist primarily of N.F.O. and independent milk producers in the states of Kentucky, Tennessee and Georgia, whereas in Mississippi and Louisiana,

the Gulf Coast dairy producers and independent producers appear to have been the primary competitors. The testimony as to the precise shares of the relevant submarket held by these competitors of D.I. has not been forthcoming, and we are unable to delineate exactly how their shares increased or decreased by reasons of the execution of the full-supply and committed supply contract, except for the inescapable conclusion that the contracts themselves did eliminate these competitors from the shares of the market to which we have previously referred.

The Court must now determine the remedy to be imposed as a result of its conclusions that violations of the Clayton Act occurred more than eleven years ago. In determining what type of injunction should be entered, the Court is faced with the fact that D.I. has indicated that it no longer uses exclusive or full-supply one year contracts. The Government has presented in a brief its proposals as to the type of injunctive relief which should be entered. D.I. should be given an opportunity to respond with its proposals within fifteen (15) days hereinafter, and with the Government given the right to file a counter-response within ten (10) days thereafter.

A judgment to this effect has been entered this day.

Dated 6/9/83.

Charles M. Allen
Chief Judge

cc: Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action
No. C 7634 A

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAIRYMEN, INC.,

Defendant.

JUDGMENT

The Court, pursuant to the mandate of the United States Court of Appeals for the Sixth Circuit, having reviewed the evidence in this action and having filed its findings of fact and conclusions of law, and being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that the defendant has not violated the provisions of Section 2 of the Sherman Act.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant has violated Section 3 of the Clayton Act.

IT IS FURTHER ORDERED AND ADJUDGED that defendant be allowed fifteen (15) days within which to file it proposals as to what type of injunctive relief would be appropriate, with the United States allowed ten (10) days thereafter in which to file a counter-response.

This is not a final and appealable judgment.

Dated 6/9/83

Charles M. Allen
Chief Judge

cc: Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action
No. 7634-A

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAIRYMEN, INC.,

Defendant.

FINAL JUDGMENT AND INJUNCTION

The Court, having entered a judgment on April 5, 1978, and on June 28, 1978, having entered a supplemental judgment; and the United States Court of Appeals for the Sixth Circuit, having directed this Court to vacate that part of those judgments which dismissed portions of the plaintiff's complaint; and the Court, having entered findings of fact and conclusions of law on June 9, 1983, and having considered the briefs of the parties with regard to the appropriate judgment to be entered, and being fully advised in the premises,

IT IS NOW ORDERED AND ADJUDGED as follows:

Those portions of the April 5, 1978 and June 21, 1978 judgments which ordered injunctive relief against Dairymen, Inc. are hereby reaffirmed and made a part of this judgment.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant, having violated Section 3 of the Clayton Act, be and it is hereby enjoined from:

(1) Requiring any buyer of milk, as a condition of receiving any milk from defendant, to enter into any contract, agreement, or understanding to accept a supply of milk for more than thirty (30) days;

(2) Entering into or enforcing any contract, agreement, or understanding with any buyer of milk which binds such buyer to purchase a supply of milk from defendant for a period in excess of one (1) year, provided, however, that nothing in this judgment prohibits any buyer from securing an assured supply of milk from defendant for a period in excess of one (1) year through options to buy or other arrangements that do not commit such buyer to purchase milk from defendant for more than one year;

(3) Entering into or enforcing any contract, agreement, or understanding for the sale of milk unless the buyer had the opportunity to purchase from defendant under such contract, agreement, or understanding any lesser quantity of milk than was offered for sale by defendant; provided, however, defendant may require the buyer to receive milk in truckload quantities;

(4) Requiring or attempting to require any buyer of milk to purchase milk for delivery to one plant as a condition to the sale and delivery of milk to any other plant of such buyer.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, United States of America, recover its costs from the defendant, Dairymen, Inc.

IT IS FURTHER ORDERED AND ADJUDGED that this injunction shall remain in effect for a period of five (5) years from the date of its entry, provided, however, that the Court at any time during the five-year period may, upon good cause shown by the United States, extend the period.

IT IS FURTHER ORDERED AND ADJUDGED that defendant shall file with plaintiff annually for a period of five (5) years, on or before June 30th, a report setting forth the steps taken by its Board of Directors to advise its officers, directors,

employees, members and all appropriate committees of its and their obligations under this final judgment.

IT IS FURTHER ORDERED AND ADJUDGED that defendant shall mail or otherwise furnish within ninety (90) days after the entry of this final judgment a copy thereof to each of its members and employees, to each person purchasing milk from or selling milk to defendant, and to any organization for which defendant acts as marketing agent, and within one hundred fifty (150) days from the aforesaid date of entry to file with the Clerk of the Court an affidavit setting forth the fact and manner of compliance with this and the following paragraph.

IT IS FURTHER ORDERED AND ADJUDGED that defendant shall publish, in a publication circulated to all its members, a copy of this final judgment once each year for two (2) years on or about the anniversary date of entry of this final judgment, and to furnish a copy of this final judgment to any person upon request.

IT IS FURTHER ORDERED AND ADJUDGED that for the purpose of determining or securing compliance with this final judgment and for no other purpose, the defendant shall permit duly authorized representatives of the Department of Justice, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendant at its principal office, subject to any legally recognized privilege:

(1) Access, during the regular business hours of defendant, who may have counsel present, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the defendant which relate to any matters contained in this final judgment;

(2) Subject to the reasonable convenience of the defendant, and without restraint or interference from it, to interview any officers or employees of defendant, who may have counsel

present, regarding any matters contained in this final judgment.

IT IS FURTHER ORDERED AND ADJUDGED that for the purpose of determining or securing compliance with this final judgment and for no other purpose, the defendant shall submit such reports in writing, under oath if so requested, with respect to any matters contained in this final judgment as may from time to time be requested in writing by the Attorney General or the Assistant Attorney General in charge of the Antitrust Division.

IT IS FURTHER ORDERED AND ADJUDGED that no information obtained by the means provided in the two preceding paragraphs, this paragraph and the following paragraph shall be divulged by a representative of the Department of Justice to any person than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this final judgment, or as otherwise required by law.

IT IS FURTHER ORDERED AND ADJUDGED that if at any time information or documents are furnished by defendant to plaintiff, and defendant represents and identifies in writing that the material in any such information or document is of a type described in Rule 26(c)(7), Federal Rules of Civil Procedure, and said defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then ten (10) days notice shall be given by plaintiff to defendant prior to divulging such material in any legal proceeding (other than a Grand Jury proceeding) to which the defendant is not a party.

IT IS FURTHER ORDERED AND ADJUDGED that jurisdiction is retained by this Court for the purpose of enabling any of the parties to this final judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction of or carrying out of this final judgment, for the modification of any of the provi-

sions hereof, for the enforcement of compliance herewith, and for the punishment of violations hereof.

This is a final and appealable judgment and there is no just cause for delay.

Dated 10-26-83

Charles M. Allen, Chief Judge

cc: Counsel of Record

UNITED STATES COURT OF APPEAL
FOR THE SIXTH CIRCUIT

Nos. 84-5003/5039

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
Cross-Appellant,

v.

DAIRYMEN, INC.,
Defendant-Appellant,
Cross-Appellee.

FILED
FEB 26, 1985
JOHN P. HEHMAN, Clerk

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

BEFORE: KEITH and JONES, Circuit Judges; and CELEBREEZE, Senior Circuit Judge.

Per Curiam. Appellant, Dairymen, Inc. (Dairymen), appeals and appellee, the Government, cross appeal from an injunction issued to prevent Dairymen's acts in contravention of § 3 of the Clayton Act.

This appeal follows a decision resulting from an earlier remand by a panel of this court. 600 F.2d 192 (6th Cir. 1981) (per curiam). Pursuant to that remand, the district court found for the government on the Clayton Act claim and for Dairymen, Inc. on the Sherman Act claim. Those holdings were followed by injunctions designed to accord appropriate relief. Costs were awarded to the Government.

Upon consideration of the issues presented by these cross-appeals, we affirm the opinion and judgment of the district court.

A

On March 29, 1973, the Government filed a complaint and alleged that Dairymen violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982), and Section 3 of the Clayton Act, 15 U.S.C. § 14 (1982). On June 1, 1973, Dairymen answered and alleged, essentially, that under the Capper-Volstead Act, 7 U.S.C. §§ 291, 292 (1982), and under the Agricultural Adjustment Act, 7 U.S.C. §§ 601-624 (1982), its actions were exempt and immunized from liability. The trial court dismissed all but two portions of the complaint. One portion related to Dairymen's Mississippi pooling practices during 1971; the other portion related to Dairymen's use of hauling contracts that prohibited its haulers from hauling milk produced by non-Dairymen producers when those producers' milk was not co-mingled with Dairymen's milk. Then, the trial court held that Dairymen's pooling practices and hauling contracts violated Sections 1 and 2 of the Sherman Act. Because Dairymen had discontinued its pooling practices, however, the court issued injunctive relief only to prevent Dairymen's usage of the hauling contracts.

The Government appealed "that portion of its action that alleged that Dairymen . . . attempted to monopolize the market in Grade A milk in the Southeastern United States. [Dairymen] . . . appealed that portion of the district court's judgment which held that it violated Section 3 of the Clayton Act by requiring its milk haulers to enter exclusive hauling contracts." 600 F.2d 192, 193 (6th Cir. 1981) (per curiam). This Court affirmed, in part, reversed in part, and remanded to the district court to determine (1) whether Dairymen used its full supply and committed-supply contracts and exclusive hauling contracts with the specific intent to monopolize; (2) whether Dairymen intended to stifle competition or to meet legitimate business purposes through its full supply and committed-sup-

ply contracts; and (3) whether Dairymen's full supply and committed-supply contracts foreclosed a substantial share of the market from its competitors and tended to create a monopoly in any line of commerce in violation of Section 3 of the Clayton Act. *Id* at 195.

On remand, the district court found that the relevant geographic submarket constituted the states of Kentucky, Tennessee, Georgia, Mississippi, and, Louisiana. The district court found that although the fast way to measure Dairymen's share of that submarket would be to "establish the amount of milk produced in that submarket and then weigh the amount of milk pooled on the Federal Order located in that state and sold to handlers," the Government produced insufficient evidence to allow the court to find "the amount of milk pooled, together with the amount of milk produced in the relevant geographic submarket. . . ." The trial court also found that the Government demonstrated that Dairymen's acts (anticompetitive pooling practices in Mississippi, illegal hauling contracts in Indiana and Tennessee, brush fire incidents, insistence upon either full supply or committed-supply contracts accompanied by threats to cutoff milk supplies to processors and by statements regarding successful competitive pricing activity) revealed a specific intent to monopolize. The trial court further found that Dairymen's share of the relevant geographic submarket was 60% in 1971 and that it decreased the years immediately following 1971 until 1975 when it was 52.1%.

The district court concluded that the Government failed to prove a violation of Section 2 of the Sherman Act because it failed to demonstrate that Dairymen possessed a monopoly or would be successful in establishing a monopoly; the Government, according to the district court, did not show that Dairymen either could control prices in the relevant market or possessed the power to effectively exclude competitors from the market. The district court further concluded that because Dairymen obtained its full supply and committed-supply contracts at the peak of its market share power (59.5% possession of and 50% control over purchase of Grade A milk in the

relevant submarket), it violated Section 3 of the Clayton Act. Consequently, the district court found for the Government on the Clayton Act claim and for Dairymen on the Sherman Act claim. Th n, the court ordered the appropriate injunctive relief and awarded costs to the Government.

Dairymen appeals from the district court's conclusion that it violated Section 3 of the Clayton Act. The Gov rnment appeals from the district court's conclusion that it failed to demonstrate violated Section 2 of the Sherman Act. Both appeals are consolidated.

B

Appellate review of the district judge's findings of fact is controlled by the "clearly erroneous" rule of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 52(a). Consequently, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge . . . the credibility of . . . witnesses." *Id.* "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also Kennedy v. Commissioner*, 671 F.2d 167, 174 (6th Cir. 1982) (citing *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948)). Our review of the district judge's conclusions of law, however, is not controlled by the "clearly erroneous" rule. Instead, we may freely review legal conclusions, ultimate findings of fact, and mixed questions of fact and law. *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134, 143, 143 n.19 (6th Cir. 1983) (indicating that legal conclusions are freely reviewable by appellate court and that questions of fact, and mixed questions of fact and law, which require the application of legal principles, are also freely reviewable).

C

DAIRYMEN'S CONTENTIONS

1.

The trial court stated

> The testimony as to the precise shares of the relevant submarket held by these competitors of D.I. has not been forthcoming, and we are unable to delineate exactly how their shares increased or decreased by reasons of the execution of the fully-supply and committed supply contract [sic], except for the inescapable conclusion that the contracts, themselves did eliminate these competitors from the share of the market to which we have previously referred.

Dairymen contends that this finding is clearly erroneous because the record on remand contained detailed information as to the percentage of Dairymen's market share in the relevant geographic submarket. In support, Dairymen cites the following figures.

1971	60.1%
1972	57.9%
1973	56.7%
1974	54.2%
1975	52.1%
1976	53.5%
1977	52.6%
1978	51.8%
1979	51.9%
1980	49.0%
1981	48.6%

Dairymen, then contends that to find the percentage of its competitors' market share the trial court only needed to have reversed those findings. According to Dairymen, therefore, the following figures would represent the percentage of its competitors' share of the milk produced in the submarket.

1971	39.3%
1972	42.1%
1973	43.3%
1974	45.8%
1975	47.9%
1976	46.5%
1977	47.4%